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~~Submitted to William F. Cannon and~~
~~11-11-1941~~
No. 9885

2
United States
Circuit Court of Appeals

For the Ninth Circuit.

6/6
Vol
2337

PEOPLE OF THE STATE OF CALIFORNIA,
on the relation of Charles J. McColgan, as
State Franchise Tax Commissioner,
Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Nevada.

FILED
SEP 9 - 1941

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

PEOPLE OF THE STATE OF CALIFORNIA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9885

PEOPLE OF THE STATE OF CALIFORNIA,
on the relation of Charles J. McColgan, as
State Franchise Tax Administrator,
Appellant,

vs.

JOHN HOWARD BRUCE,
Appellee.

AGREED STATEMENT OF THE CASE

Defendant is, and has been since about May 10, 1937, a resident of the State of Nevada. Prior to May 10, 1937, for all years material to this action, defendant, was a resident of the State of California.

Charles J. McColgan is a resident of California, and is the duly appointed, qualified and acting Franchise Tax Commissioner of the State of California.

This action was instituted in March of 1940 to collect state income taxes assertedly due from defendant to plaintiff. Judgment for defendant was entered on March 22, 1941, from which plaintiff has appealed.

The Facts

In early 1936, defendant, while married, living with his wife, and a resident of California, bought

in California from a resident of California, an Irish Sweepstakes ticket for the price of \$2.50. Defendant's name appeared on the counterfoil which was sent to the Sweepstakes officials in Ireland. Soon the drawing occurred in Ireland and defendant's ticket drew a horse which was running in the race. Defendant then sold a half interest in his ticket to a New York syndicate for \$5,000, which sum he subsequently (in April, 1937) reported to the State of California and on which he paid a California income tax. Defendant retained this ticket in his possession at all times. About May 26, 1936, the race was run and the horse drawn by defendant's ticket won first place, entitling the holder or holders of the ticket to the first prize of \$150,000.

Payment of his winnings was not immediately made to defendant, however, for suit was instituted in the Irish courts by one William Leathe to prevent the payment of the entire proceeds to defendant and to compel the payment of half the proceeds to Leathe. This suit was withdrawn by Leathe some time between May 10, 1937 and June 25, 1937, for a settlement of \$5,000. Immediately thereafter \$75,000 was received by the New York syndicate, and defendant received the other \$75,000, less \$5,000 used to settle with Leathe and \$10,000 for attorneys fees and expenses. On June 25, 1937 the First National Bank in Reno collected \$59,356.66 for defendant and credited that sum to defendant's account, less charges.

Defendant and his wife were residents of California when the ticket was purchased and when the race was run. The defendant and his wife then moved to Nevada under circumstances described by defendant in his testimony, which was as follows:

“We thought we would have to go over there (Ireland) to fight the case, then in the latter part of 1936 they (the attorneys) thought it would be settled out of court, so in the early part of 1937 we started looking around and trying to make up our mind what to do and where to go. I had previously lived in Nevada.”

* * * * *

“I don’t remember the date, to tell you the truth, because we came up here (Nevada) quite some time before the final settlement, I really haven’t the slightest idea in the world. It was after we had come up here, I don’t remember the date.”

On or about May 10, 1937, defendant and his wife became residents of that State. Thereafter the Leathe suit was settled and defendant was paid.

The California Franchise Tax Commissioner, on June 10, 1937, issued a jeopardy assessment against defendant, assessing him with income tax of \$4,345.84 on net income of \$70,000. Defendant at that time had not and since has not filed an income tax return with the California authorities reporting his winnings from the Irish Sweepstakes nor

has he paid a tax to California thereon. The assessment notice was duly mailed to defendant at his last known address, but he did not receive it.

As the assessment was not paid in whole or in part, this action was instituted in the United States District Court for the District of Nevada to recover the unpaid assessment, and defendant was duly served and appeared. The complaint which was filed alleged that the federal district court for Nevada had jurisdiction. Those allegations were as follows:

“This court has jurisdiction because this is a controversy between citizens of two states involving an amount in excess of \$3,000. Plaintiff Charles J. McColgan is a citizen of the State of California and defendant John Howard Bruce is a citizen of the State of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000).

“This court has jurisdiction because this is an action for taxes. Jurisdiction is founded on Section 24(5) of the Judicial Code, United States Code Title 28, Section 41(5).

“This court has jurisdiction because Article IV Section 1 of the United States Constitution, commonly known as the full faith and credit clause, compels it to exercise jurisdiction.”

Thereafter the complaint alleged the facts on which the claimed cause of action was based.

The answer of defendant denied that the court had jurisdiction and denied that defendant owed any California income tax.

At the trial the plaintiff offered in evidence, as proof of Irish law, the reported opinion in each of two Irish decisions. This offer of evidence, the objection thereto, the court's ruling and the evidence itself are contained in the Reporter's Transcript which is a separate part of the record on appeal, and may be found therein.

After all of the evidence had been introduced, and there being no conflict in said evidence, the plaintiff moved that the jury be dismissed because there was nothing for the jury to decide as the only questions presented were of the law to be applied to the facts. The defendant objected to this motion on appropriate grounds. The motion was granted over defendant's objection and the jury was dismissed. The defendant took an exception.

The Decision of the District Court and

The Notice of Appeal

Thereafter the court held that it had jurisdiction over the parties and the subject matter, found that defendant was a resident of Nevada when he came into possession of the income involved, and ruled that California did not have jurisdiction to tax that income. Judgment was entered for defendant on March 22, 1941. A copy of that judgment is set forth

hereinafter. Notice of Appeal was filed by plaintiff on June 13, 1941. A copy of that notice of appeal is set forth hereinafter.

Points to be Relied on by Appellant

The points to be relied on by appellant are as follows:

1. That the court had jurisdiction.
2. That the Personal Income Tax Act of California imposed an income tax on defendant on account of the income concerned herein.
3. That the State of California had jurisdiction to impose the tax.
4. That the tax was due in the amount assessed.
5. That the trial court erred in not admitting in evidence reported Irish decisions as proof of Irish law.

Judgment of the Court

“Judgment entered for defendant pursuant to Opinion and Decision filed this day.”

NOTICE OF APPEAL

“Notice Is Hereby Given that the People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Administrator, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on March 22, 1941.

EARL WARREN,

Attorney General of the State
of California;

H. H. LINNEY,

H. H. Linney, Deputy,

VALENTINE BROOKES,

Valentine Brookes, Deputy,

Attorneys for Plaintiff, People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Administrator, 600 State Building, San Francisco, California."

The parties hereto agree that the foregoing constitutes a complete and accurate statement of the case, and that said statement contains all the facts and proceedings which will need to be considered by the Circuit Court of Appeals in the appeal herein, excepting those contained in the reporter's transcript forming a separate part of the record on appeal.

People of the State of California,
on the relation of Charles J.
McColgan, as State Franchise
Tax Administrator,

Plaintiff and Appellant.

By EARL WARREN,

Attorney General of the State
of California.

H. H. LINNEY,

Deputy Attorney General.

VALENTINE BROOKES,
Deputy Attorney General.
JOHN HOWARD BRUCE,
Defendant and Appellee.
By A. P. JOHNSON.

Approved:

FRANK H. NORCROSS,
Judge, United States District Court
For the District of Nevada.

In the District Court of the United States, in and
for the District of Nevada.

No. 104

PEOPLE of the STATE OF CALIFORNIA, ON
THE RELATION OF CHARLES J. McCOL-
GAN, as STATE FRANCHISE TAX AD-
MINISTRATOR,

Plaintiff,

vs.

JOHN HOWARD BRUCE,

Defendant.

TRIAL
PROCEEDINGS RELATING TO THE OFFER
IN EVIDENCE OF THE REPORTS OF
THE TWO IRISH COURT DECISIONS,
PLAINTIFF'S EXHIBITS NOS. 3 AND 4
FOR IDENTIFICATION.

At the conclusion of testimony of the defendant,
John Howard Bruce, the following proceedings

were had:

Mr. Linney: Now, if the Court please, we think in this case there is involved the law of Ireland. We have two cases in the Ireland court which we would like to introduce in evidence in this case. I presume Mr. Johnson would be agreeable to stipulating that if the cases are introduced in evidence we can withdraw these volumes, which belong to the San Francisco law library, and substitute copies, certified by someone that they had been compared, etc. Now if we introduce these cases in evidence, perhaps the Court will require that we read them to the jury. They are quite long and it will take us a little time.

Mr. Johnson: To which records, your Honor, we naturally object. I do not think under our procedure in Nevada we are permitted to read any law to the jury, so I do most respectfully object to the introduction as evidence in this case any decisions of courts of Ireland or any other foreign country. I do not [9] think that is proper, your Honor, under procedure in the State of Nevada. I do not know about California, but I am quite confident of that ruling in this State, your Honor.

Mr. Linney: Perhaps I didn't make it quite clear. I didn't suppose this Court would take judicial notice of decisions of the Irish courts. That is the reason why, if they go into evidence, we have to offer these particular cases. Otherwise, if the Court takes judicial notice of the decisions, we don't need to do it.

The Court: Is there any other matter, other than questions of law as offered by the courts of Ireland in the opinions that you refer to?

Mr. Linney: These opinions deal with interlocutory situations and the application of the law of Ireland to this situation, involving somewhat similar transaction; in other words, Sweepstake Winnings.

The Court: I am under the impression that that matter could be considered better as a question of law. If you wish to give the jury instructions in respect to any case, that may be deemed applicable to this case if the Court finally permits that is proper.

Mr. Linnèy: Would it be stipulated that we can, in any event, offer these volumes in evidence, without reading them to the jury, and submit copies of these two particular reports? I think I should perhaps name them for the record.

The Court: For the record they may be offered, with the privilege of substituting copies and for the present they would be simply, the copies or the books themselves, considered as received for identification at the present time. [10]

Mr. Linney: I offer then, if the Court please, the case of Mabel McKie, Plaintiff, vs. The Rt. Hon. The Earl of Granard and Others, found in Law Reports of Ireland 1933. There doesn't seem to be any number on the book, your Honor, at page 464. That is the High Court of Justice.

In the case of Apicella And Another v. Scala And Others—I am not an Irish scholar, but the words

here are "Right of action in Saorstat Eireann" High Court and that is found in Volume 66 Irish Law Times Reports, 1932, at page 33.

(McKie vs. The Rt. Hon. The Earl of Grarnard marked Plaintiff's Exhibit No. 3 for identification; Apicella and Another vs. Scala and Others marked Plaintiff's Exhibit No. 4 for identification.)

Is it understood, your Honor, we may take these books with us, I mean when this case is over?

The Court: I think that can be arranged.

Mr. Johnson: I understand these are now merely offered for the purpose of identification.

The Court: They are received for that purpose. They are offered in evidence. We will consider that later before the case goes to the jury.

Mr. Linney: That is all, your Honor. [11]

* * * * *

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present at the trial of the case entitled People of the State of California on the Relation of Charles J. McCoglan, as State Franchise Tax Administrator, Plaintiff, vs. John Howard Bruce, Defendant, No. 104, held at Carson City, Nevada, on the 16th and 17th days of December, 1940, and took verbatim shorthand notes of the testi-

mony adduced and proceedings had at that trial; that the foregoing pages, numbered 1 to 3 inclusive, comprise a full, true, and complete transcript of my shorthand notes taken on December 16, 1940, with relation to the offer in evidence of Plaintiff's Exhibits Nos. 3 and 4 for Identification, as taken from pages 107, 108, 109, and 110 of notebook No. 23 for 1940.

Dated at Carson City, Nevada, this 10th day of July, 1941.

MARIE D. McINTYRE,
Official Court Reporter, United States District
Court, District of Nevada.

[Endorsed]: Filed July 10, 1941. O. E. Benham,
Clerk. By O. F. Pratt, Deputy. [12]

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No. 104

United States District Court, District of Nevada

PLAINTIFF'S EXHIBIT NO. 3

for Identification

Meredith J.

1933

April 24; May 9, 23, 26.

MABEL McKIE,

Plaintiff,

v.

THE RT. HON. THE EARL OF GRANARD and
OTHERS (Trustees for Statutory Deposits of
Prize Money under the PUBLIC CHARITABLE HOSPITALS (Temporary Provisions) Act, 1930, THE COMMITTEE conducting the GRAND NATIONAL SWEEPSTAKE under the provisions of the said Act, and HOSPITALS TRUST, LIMITED (Being the promoters of said sweepstake for said Committee), and FRANCIS PATRICK McKIE,
Defendants.

Conflict of laws—Decrees of foreign Court—Prize money in Sweepstake in Irish Free State—Holder of a winning ticket resident in California—Application for interlocutory injunction restraining payment out of prize money—Decrees of California Court directing money to be lodged in Californian Court and directing

mode of payment—Decrees of Californian Court not final and conclusive—Enforcement of decrees in Irish Free State.

The plaintiff's husband was the purchaser of a ticket which drew a horse in a sweepstake in the Irish Free State entitling the purchaser to a certain sum as prize money. Subsequently the plaintiff applied for a divorce in the Superior Court of California, the parties being resident in that State. Plaintiff on such application was granted a "temporary restraining order" enjoining her husband from disposing of the prize money, and directing him to deposit it with the Clerk of the Court in California to await the further order of the Court. Subsequently the California Court granted an interlocutory decree dissolving the marriage and the Court decreed that the winning ticket with the prize money won by it was the "community property" of the plaintiff's husband and the plaintiff, and the Court assigned and awarded the same to the plaintiff. The plaintiff then issued a plenary summons in the High Court of the Irish Free State, naming as defendants the Trustees for Statutory Deposits of Prize money under the Public Charitable Hospitals (Temporary Provisions) Act, 1930, the Committee conducting the said Sweepstake under the provisions of the said Act, Hospitals Trust, Limited (being the promoters of the said Sweepstake for the said Committee), and her husband, and

claiming: 1, a declaration that she was the owner of the ticket and entitled to the prize money and all other benefits won by the said ticket, and 2, an order that the defendants, the said Trustees and Committee and Hospitals Trust, Limited, should pay to her the amount found due, and 3, an injunction restraining the said defendants from paying out or parting with the said prize money or other benefits thereof to any other person. Subsequently she applied for an interlocutory injunction in these terms, relying on the decree of the Californian Court.

Held that the decree of the Californian Court could not have any effect in the Irish Free State as the subject-matter of the decree was not within the control of the State of California, and accordingly the motion for an interlocutory injunction must be refused.

The principle stated by Blackburn J. in *Castrique v. Imrie*, L. R. 4 H. L. 414, at p. 435, applied.

Motion for an interlocutory injunction.

On the 24th April, 1933, the plaintiff, Mabel McKie, issued a plenary summons, the defendants being the Trustees for Statutory Deposits of Prize Money under the Public Charitable Hospitals (Temporary Provisions) Act, 1930, the Committee conducting the Grand National Sweepstake under the provisions of the said Act, "Hospitals Trust, Lim-

ited'' (being the promoters of the said Sweepstake for the said Committee) and Francis Patrick McKie, and the summons claimed: 1, a declaration that the plaintiff was the owner of the ticket, No. C. E. 30472, in the Grand National Sweepstake of March 24th, 1933, and was entitled to the prize money and all other benefits won by the said ticket; (2) an account of the prize money and other benefits due on the said ticket; (3) an order that the defendants, the said Trustees and Committee and Hospitals Trust, Limited, pay to the plaintiff the amounts found due on same; (4) an injunction restraining the defendants, the said Trustees and Committee and Hospitals Trust, Limited, from paying out or parting with the said prize money or other benefits thereof to any person other than the plaintiff.

On the same day the plaintiff applied for and obtained an interim order restraining the defendants until the 9th May, 1933, from paying out or parting with the prize money, and on the 9th May the plaintiff brought this present application for an interlocutory injunction.

In support of this application Mr. Robert Hayes, the plaintiff's solicitor, made an affidavit setting out the facts as follows:

On the 1st of October, 1931, the plaintiff was married to the defendant, Francis Patrick McKie, and on or about the 29th of March, 1932, the said defendant deserted the plaintiff and left her destitute. On a date subsequent to the marriage but prior to the dissolution thereof the said defendant pur-

chased a ticket, No. C. E. 30472, in the Irish Free State Hospitals' Sweepstake on the "Grand National" Race under the nom-de-plume of "Gordon Richards." The said ticket drew the horse known as "Solanum" in the said race and the said defendant thereby became entitled to a prize in the said sweepstake of £660 7s. 6d., or, approximately, two thousand two hundred and fifty dollars in the currency of the United States.

In or about the month of March, 1933, and subsequent to the purchase of the said ticket the plaintiff instituted proceedings in the Superior Court of the State of California, United States of America, against the defendant for divorce, and on the 5th day of April, 1933, the said Court granted to the plaintiff an interlocutory decree dissolving the said marriage.

Deponent referred to a certified copy of the interlocutory decree made by the said Superior Court of the State of California, the plaintiff's "Complaint for divorce," in support of said decree sworn by her on the 24th March, 1933, being as follows:

“In the Superior Court of the State of California, in and for the City and County of San Francisco.

“MABEL McKIE,

Plaintiff,

v.

“FRANCIS PATRICK McKIE also known
as FRANK PATRICK McKIE,

Defendant.

“COMPLAINT FOR DIVORCE.

“Plaintiff complains of defendant and for cause of action alleges:

“1. Plaintiff herein is now and has been for more than one year last past, a resident of the City and County of San Francisco, State of California, and defendant is now and has been for a long period of time last past a resident of the said City and County of San Francisco, in said State.

“2. Plaintiff and defendant intermarried at and in the City and County of San Francisco, State of California, on October 1st, 1931, and ever since have been and now are husband and wife.

“3. There are no children, issue of said marriage.

“4. Plaintiff and defendant separated on or about March 29th, 1932. The time from mar-

riage to separation was approximately six months.

“5. There is community property belonging to the said plaintiff and defendant and said community property consists of the following:

“Heretofore and within a period of less than one month prior to the commencement of this action, defendant purchased a ticket of the Irish Free State Hospitals' Sweepstake on a horse race known as the 'Grand National,' held under the Public Charitable Hospitals Acts of 1930-1931-1932 of Great Britain (sic), conducted and managed by the Hospitals' Committee, the said horse race being run at Aintree, England, on March 24th, 1933, the number of said ticket is unknown to this plaintiff. Said ticket aforesaid was purchased by the defendant out of community property or earnings of the parties hereto and said purchase of said ticket was made at and in the City and County of San Francisco, State of California. A public drawing of the tickets issued in said Irish Free State Hospitals' Sweepstake was held on March 22nd, 1933, in Dublin, Ireland, under the supervision of the Chief Commissioner of Police at Dublin, and as a result thereof the ticket so purchased and now held by the defendant became entitled to participate in the distribution of prizes given pursuant to the said Sweepstake to an amount in excess of one hundred thousand (\$100,000.00) dollars, the exact amount of which is unknown

to this plaintiff. Said defendant, as plaintiff is informed and believes, and therefore alleges, is now in possession of said ticket and threatens to, and will, unless restrained by this Court, collect the proceeds thereof and appropriate the same to his own use and depart from the jurisdiction of this Court therewith without turning over, delivering, or transferring any part thereof to this plaintiff.

“Plaintiff is without the necessary means to prosecute this action and pay the necessary costs involved therein or counsel’s fees, and has no plain, speedy, or adequate remedy at law to protect her rights in and to the said community property.

“6. That during the period of more than one year next immediately preceding the filing of this complaint, defendant neglected to provide plaintiff the common necessities of life, he having the ability to do so. That plaintiff has for a period of more than one year last past been compelled to rely upon her own efforts in order to provide herself with the common necessities of life.

“As a second, separate and further cause of action, plaintiff complains and alleges: [States further facts necessary to support application for divorce.]

“Wherefore plaintiff prays that upon the trial of this action, it be decreed that plaintiff has a good and valid cause of action against

defendant upon the ground of defendant's wilful neglect of plaintiff and upon the ground of defendant's extreme cruelty to plaintiff and that the bonds of matrimony existing between plaintiff and defendant be dissolved: that defendant be ordered to pay the plaintiff the necessary costs of this action and necessary counsel's fees, and, further, that, pending the trial of this action, the said defendant, his servants, agents and counsel and all other persons acting in aid and assistance of said defendant be restrained from disposing of the said ticket in the said Irish Free State Hospitals' Sweepstake and any proceeds or money received therefrom, and, further, that the said defendant be restrained by an order of this Court from leaving the jurisdiction of this Court unless and until the said defendant deposits with the Clerk of this Court the aforesaid ticket of the Irish Free State Hospitals' Sweepstake to await the order of this Court with respect thereto; and for such other and further relief as may be meet and proper in the premises; and that the community property referred to be awarded to plaintiff."

The following "order to show cause and temporary restraining order" was thereon made:

“In the Superior Court of the State of California, in and for the City and County of San Francisco.

“MABEL McKIE,

Plaintiff,

v.

“FRANCIS PATRICK McKIE also known as
FRANK PATRICK McKIE,
Defendant.

“ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.

“Upon reading and filing the complaint of Mabel McKie herein and good cause appearing therefor, it is hereby

“Ordered that the defendant, Francis Patrick McKie, also known as Frank Patrick McKie, do be and appear before the above entitled Court (in the Court room of department 10 thereof, City Hall, San Francisco, California) on Tuesday the 28th day of March, 1933, at 10 o'clock a. m. of said day, then and there to show cause, if any he has, why the relief prayed for in the complaint herein should not be granted; and it is further

“Ordered that, pending the hearing upon this order to show cause and until the further order of the Court, the said defendant Francis Patrick McKie, also known as Frank Patrick

McKie, his servants, agents, counsellors and all others acting in aid and assistance of the said defendant, and each and all of said persons be and they are hereby enjoined and restrained from in any manner transferring, assigning, selling or in any manner disposing of the ticket in the said Irish Free State Hospitals' Sweepstake described in the complaint and from transferring, assigning or in any manner disposing of the proceeds and/or money received therefrom, and, further, that the said defendant be and he is hereby ordered and directed forthwith to deposit with the Clerk of this Court the aforesaid ticket in the Irish Free State Hospitals' Sweepstake and/or any money or proceeds received therefrom, to await the further order of the Court with respect thereto. It is further ordered that a copy of this order to show cause and temporary restraining order be served upon the defendant herein together with a copy of said complaint.

“Dated March 24th, 1933.

“THOS. F. GRAHAM, Judge.”

The material portion of the “Interlocutory Decree of Divorce” was as follows:

“This cause came on regularly for trial on this 5th day of April, 1933, upon the plaintiff's complaint herein taken as confessed by the defendant, whose default for not answering had been duly entered, and upon the proofs taken

herein, from which it appears, and this Court finds, that all the allegations of the complaint are true, and that they are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency; and it also appearing to said Court that said defendant was regularly served with the summons issued in this action; and all and singular the law and the premises being by the Court here understood and fully considered:

“Wherefore it is here ordered, adjudged and decreed and this Court does hereby order, adjudge and decree as and for an interlocutory decree herein, that plaintiff is entitled to an interlocutory decree of this Court, adjudging that she has established grounds for the dissolution of the bonds of matrimony heretofore and now existing between said plaintiff and said defendant and subject to the provisions of the statute in such case made and provided, and, in pursuance thereof, such interlocutory decree is hereby made on the grounds of defendant’s extreme cruelty to plaintiff and that, upon the expiration of one year from the entry of this decree, final judgment granting said decree and restoring said parties to the status of single persons, be entered herein.

“It appearing to the Court, and the Court so finds, that a certain ticket, No. C. E. 30472, of the Irish Free State Hospitals’ Sweepstake for the Grand National race held at Aintree, Eng-

land, on March 24th, 1933, together with the prize won by said ticket amounting to the sum of approximately twenty-two hundred and fifty dollars (\$2250.00) in the drawing conducted in Dublin, Ireland, on March 22nd, 1933, under the supervision of the Dublin Commissioner of Police, is community property of the parties; and the Court further finds that any other ticket or tickets in said sweepstake belonging to or in the name of said defendant and/or Gordon Richards, together with the proceeds thereof or the prizes appertaining thereto, are the community property of the parties.

“It further appearing to the Court from all the facts of the case and the condition of the parties that it is just and proper that said community property be awarded and assigned to the plaintiff, now therefore be it further ordered, adjudged and decreed that the community property hereinbefore in this decree described and all of the same be and the same is hereby assigned and awarded to plaintiff Mabel McKie.”

The affidavit of the plaintiff's solicitor continued as follows: Mr. Louis E. Goodman, a member of the firm of Goodman, Bachrack and Brownstone, Attorneys-at-Law, practising in San Francisco, informed deponent that under the law of the State of California all property of either husband or wife acquired while married except property acquired by gift, bequest, descent or devise is community prop-

erty and belongs to both husband and wife and that upon a divorce being granted the Courts of the said State have discretion to award the whole or any part of the community property to either spouse.

That on the 29th March, 1933, a letter was written to Messrs. Craig, Gardner & Co., the auditors and accountants of the Irish Free State Hospitals Sweepstake, warning them not to part with the said prize money without notice to plaintiff's solicitors. That on or about the 19th of April, 1933, the deponent was informed by Mr. O'Reilly, solicitor for the defendant Trustees, that unless restrained by order of the High Court of Justice of the Irish Free State it was the intention of the Trustees to pay out the said prize money to the said defendant, Francis Patrick McKie, or his nominee on Tuesday the 25th April.

In an affidavit filed on behalf of the defendant, Francis Patrick McKie, made by Mr. Albert Hyman Robbins, of 2 Brick Court, Temple, London, Barrister-at-Law, and also an attorney and counselor-at-law of the United States of America, being a member of the Bar of the State of Illinois and of the Bar of the United States Supreme Court, it was stated that under the law of California upon a "Complaint for Divorce" being filed, the summons and copy of the Complaint are, if possible, served personally upon the defendant. If such personal service is effected and the defendant does not file an answer with the Clerk of the Court within the

time specified in the summons the Clerk must enter the default of the defendant, and thereafter the plaintiff may apply to the Court for the relief demanded in the said Complaint. The Court then hears the proofs or evidence but at this stage can only grant an Interlocutory Decree of Divorce. [Deponent referred to the plaintiff's summons for divorce and the attached "Complaint for Divorce, dated the 24th March, 1933, set out above.] The decree in such proceedings is in the first instance always purely interlocutory and does not become final until one year has expired after the entry of such Interlocutory Decree, at which time the Court may grant such other and further relief as may be necessary to complete the disposition of the action; but if any appeal is taken from the interlocutory judgment, or motion for a new trial made, a final judgment or decree shall not be entered until such appeal or motion has been finally disposed of. Such Interlocutory Decree does not dissolve the marriage but is a declaration that one of the spouses is entitled to a divorce after the expiration of one year after entry. Upon the granting of an Interlocutory Decree on the ground of adultery or extreme cruelty the Court has the discretionary power to allot the community property to the respective parties in such proportions as the Court from all the facts of the case and the condition of the parties may deem just. Such dealing with community property upon the granting of an Interlocutory Decree is of a purely interlocutory nature and a trial Court

should not by such Interlocutory Decree *eo instante* assign and dispose of community property although it may determine therein how such property shall be ultimately assigned and awarded when the marriage is dissolved by a final decree of divorce. Such an interlocutory decree vests no title to the community property in the plaintiff herein but constitutes a temporary and provisional contract between the parties pending the entry of a final decree. Upon the defendant taking some action, proceeding, or motion to change this status, the Court may make some provision regarding the safeguarding of the community property; but until the Court adjudicates this question the husband has control of the property. In the event of an interlocutory decree being reversed the appellate Courts can allot the community property to the respective parties in such proportions as they may deem just. "Community property" means all property acquired after marriage by either husband or wife, or both, excepting all property acquired either by husband or wife by gift, bequest, devise, or descent. The ordinary law is that the control and management of the community property is in the hands of the husband. In the State of California betting and wagering transactions are illegal. Though the Courts of California would thus refuse the assistance of its process to the purchaser of a sweepstake ticket they will deal with such a ticket when the matter comes before them collaterally as in this case.

The defendant, Francis Patrick McKie, made an affidavit in which he described himself as of 29 Lower Leeson Street, in the City of Dublin, and in which he stated that he was a British citizen and was born in England in 1899. That in the year 1921 he was serving as a seaman on board a ship which touched at San Francisco, and he went ashore and remained in San Francisco. He had no visa or permit of any kind to enter the United States of America and his entry was without the sanction of the immigration authorities and contrary to the laws of the United States. He went to Canada in July, 1925, but returned to San Francisco in November, 1925. His entry into the United States was again without sanction. He married the plaintiff on the 1st October, 1931, in San Francisco. He remained in San Francisco until March, 1932, when he returned to England. He returned to San Francisco in November, 1932, to seek a reconciliation with his wife (plaintiff) with whom he had quarrelled. On this occasion he again entered the United States contrary to law and without the sanction of the immigration authorities. On the 22nd March, 1933, he received a telegram from the Irish Hospitals Trust, Limited, informing him that the ticket No. C. E. 30472 had drawn the horse "Solanum" in the Irish Hospitals' Sweepstake on the Grand National Race, and he immediately telephoned to his wife (plaintiff) and informed her of the fact. On the 24th March, 1933, the plaintiff commenced pro-

ceedings for divorce by swearing the said "Complaint for Divorce."

G. Gavan Duffy K. C. (with him E. S. Robinson) for the plaintiff in support of the motion:

This is not a question of enforcing a foreign judgment, but solely of the preservation of the property pending the trial of the action. The basis of the jurisdiction to grant an interlocutory injunction is the protection of legal rights. On the hearing of a motion for an interlocutory injunction the Court does not determine the legal rights but merely protects them, and the Court presumes the existence of a legal right when a fair *prima facie* case is made out. The Court does not require a clear legal right or title to be proved: *Leney v. Callingham* (1); *Societe Generale de Paris v. Dreyfus* (2). Any vexatious alienation during the progress of a suit will be restrained: *Hart v. Herwig* (3). The question is whether or not the Court has power to prevent the removal of a specific chattel out of the jurisdiction. It is settled that where an order has been made for the payment of money the Court will restrain dealing with the money so as to put it out of the control of the Court, and in such circumstances the Court will restrain third parties from paying the money to the defendant: *Bullus v. Bullus* (4). It is not necessary to have a final foreign decree to base

(1) [1908] 1 K. B. 84.

(2) 37 Ch. D. 215.

(3) 8 Ch. 860.

(4) 102 L. T. 399.

a claim by the plaintiff for such protection. Any decree will give the plaintiff such a *prima facie* right, and no question of international law arises. Dicey's "Conflict of Laws," 4th edit., p. 449, rule 111, lays down that any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid. Rule 112 states that a valid foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error of fact or law, and *Henderson v. Henderson* (5) is cited in support of this rule.

If there be any question of change of domicile the onus of proving it is on the party alleging it: *Udney v. Udney* (6).

[They cited also *Cruikshank v. Roberts* (7); *Harmon v. Jones* (8); *Nouvion v. Freeman* (9).]

Cecil Lavery K. C. (with him John Farrell) for the defendant, Francis Patrick McKie:

The foreign decree upon which the plaintiff relies does not fulfil the first essential requirement that it must be final and conclusive. On its face the decree is merely an interlocutory decree of divorce which may become final after twelve months. Yet it is

(5) 6 Q. B. 288.

(6) L. R. 1 Sc., App. 441.

(7) 6 Mad. 104.

(8) Cr. & Ph. 299.

(9) 15 A. C. 1.

suggested that this interlocutory decree determines property rights between the parties. In *McDonnell v. McDonnell* (10) it was held that a maintenance order upon which the plaintiff had obtained a final judgment for each instalment due was not such a final judgment. It is settled that our Courts will give effect to a judgment of a foreign Court of competent jurisdiction but only if such judgment is final and conclusive: *Nouvion v. Freeman* (1); *Harrop v. Harrop* (2); *In re Macartney*; *Macfarlane v. McCartney* (3); *Roussillon v. Roussillon* (4); *De Brimont v. Penniman* (5). The consideration of what is meant by "competent jurisdiction" shows that the foreign judgment in this case is not one of a Court of competent jurisdiction. Competent jurisdiction involves complete jurisdiction over the defendant and over the property in dispute by the Court pronouncing judgment. But the prize money in this case is not within the jurisdiction of the State of California. [He referred to *In re Queensland Mercantile and Agency Co.* (6).] Nor is the defendant within the jurisdiction of that State. He was born in England of English parents and, though he had lived for ten years in America, he was not a naturalized citizen of that country, which he entered in defiance of the immigration laws.

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- (10) [1921] 2 I. R. 148.
(1) 15 A. C. 1.
(2) [1920] 3 K. B. 386.
(3) [1921] 1 Ch. 522.
(4) 14 Ch. D. 351.
(5) 10 Blatch. 436.
(6) [1891] 1 Ch. 536.

Moreover, the foreign judgment here is contrary to the public policy of this country and for this reason cannot be recognized. There is no method known to our law whereby a Court could grant an interlocutory decree of divorce and finally decide the rights of the parties to property legally belonging to one of them. The Courts of this country will not entertain an action upon a foreign judgment obtained upon grounds which would give rise to no cause of action in this country. Such a judgment has no extra territorial jurisdiction: *In re Macartney; Macfarlane v. Macartney* (7).

It cannot be said that there is no question of enforcing a foreign judgment. Without the interlocutory decree of the State of California the plaintiff could not have obtained the interim injunction, and has now no *prima facie* case for making that interim injunction interlocutory pending the trial of the action. [They cited also *Favorke v. Steinkopff* (8); *New York Life Insurance Co. v. Public Trustee* (9); *Cammell v. Sewell* (10); *Castrique v. Imrie* (11); *Patrick v. Sheddon* (12) *Goddard v. Grey* (13); *Pemberton v. Hughes* (14).]

Nolan Whelan for the trustee defendants.

Cur. adv. vult.

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- (7) [1921] 1 Ch. 522.
 - (8) [1922] 1 Ch. 174.
 - (9) [1924] 2 Ch. 101.
 - (10) 5 H. & N. 728.
 - (11) L. R. 4 H. L. 414.
 - (12) 2 E. & B. 14.
 - (13) L. R. 6 Q. B. 139.
 - (14) [1899] 1 Ch. 781.

Meredith, J.:

It appears from the evidence of Mr. Robbins, a member of the Bar of the United States Supreme Court, that, under the law of the State of California, upon the granting of an interlocutory decree for divorce on the ground of adultery or extreme cruelty, the Court has a discretionary power to allot community property to the respective parties in such proportions as the Court, from all the facts of the case, and the condition of the parties, may deem just.

From the Exemplification of Record in an action in the Supreme Court of the State of California, in and for the City and County of San Francisco, between the said plaintiff in these proceedings, as plaintiff, and the said defendant in these proceedings, as defendant, the Court granted such an interlocutory decree for divorce. The Court further adjudicated that a certain ticket, number C. E. 30472, of the Irish Free State Hospitals' Sweepstake for the Grand National Race held at Aintree, England on March 24th, 1933, together with the prize money won by said ticket, was community property. Having so held, and it having appeared to the Court from all the facts of the case and the condition of the parties that it was just and proper that the said community property be awarded and assigned to the plaintiff, the Court further assigned and awarded the same to the plaintiff. On the strength of this assignment and award, and upon that alone,

the plaintiff bases her claim to the equitable relief sought in this action.

The adjudication of the American Court that the property in question is community property is, in itself, of no assistance to the plaintiff. As appears from the evidence of Mr. Robbins the fact of the property being community property would not in itself confer any title on the plaintiff to have the prize money paid to her, or to restrain its payment out to the defendant, Francis Patrick McKie. It is the discretionary order assigning the property, which is property in this country and under the effective jurisdiction of these Courts, that the plaintiff seeks to prevent from being ineffective, and for that purpose seeks an injunction restraining the payment out to the said defendant, and asks for payment to herself, notwithstanding that there remains undischarged and still to be obeyed an order of the 24th March, 1933, by the said Court ordering and directing the said defendant to deposit with the Clerk of the said Court, the said ticket or any money or proceeds received therefrom, to await the further order of the Court with respect thereto. If the said defendant is paid the money and if he obeys the said order the plaintiff will presumably be entitled to apply to the Court in California for payment of the money to her in accordance with the order of the Court awarding and assigning it to her. When the Court awarded and assigned the community property to the plaintiff it granted her no further injunction or order, but left the previous

order to do its work. It is not immediately obvious to me why this Court should interfere with the admirable machinery put into operation by the Court of the State of California.

In Dicey's "Conflict of Laws" (4th ed., at p. 24) I find the following observation: "The plain truth is—and this holds good of England no less than of other States—that every country claims for its own Courts wider extra territorial authority than it willingly concedes to foreign tribunals. Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not 'duly' acquired." Certainly the Courts of the Irish Free State will not be wanting in any ordinary and generally recognized international comity if they decline to resort to their auxiliary or equitable jurisdiction to render effective the award or assignment by a foreign Court of property situate here, and belonging to a person who according to our law is the rightful owner, in exercise of a merely discretionary jurisdiction peculiar to the foreign Court, by which the property can be transferred to a person who only acquires a right or title to it from the order of the Court.

Counsel for the trustee defendants stated that those defendants took no side on the question of title to the prize money. But these sweepstakes are legal in this country, whereas in certain foreign countries they are illegal; and, as I understand, the sweepstake tickets and the prize money can be confiscated. If the plaintiff's contention in this case

is sound, then I do not see why any order of confiscation, even while the property remains in this country, would not be enforceable here. If that were the law, then Hospital Trust, Limited, might as well close down, despite our Act, as far as foreign business is concerned. Surely the plaintiff cannot seriously contend that the title to all the movable property in this country is at the mercy of whatever discretionary jurisdictions foreign countries may confer upon their Courts.

But I have no reason to suppose, and in fact I do not imagine, that the Court of the State of California expected that the Courts of the Irish Free State would give such extra territorial effect to its assignment and award as to give the plaintiff here the orders which she seeks. The order of the California Court anticipated the possibility of the property coming under the effective jurisdiction of that Court. The ticket itself, for anything the Court knew, might have been in the State of California at the time the order was made, and, if it were, the title to the ticket itself as a mere document would have to be considered on a different footing. The evidence of Mr. Robbins is to the effect that in the State of California betting and wagering transactions are illegal, and that the Courts of California would refuse the assistance of its process to the purchaser of a sweepstake ticket. Accordingly the plaintiff asks this Court, on the strength of the judgment of the Californian Court, to do for her what the Californian Court itself would not do. I

can hardly imagine the Californian Court anticipated that her efforts would be successful.

In a recent case I had occasion to deal with agreements made in England assigning sweepstake tickets or shares of such tickets, and I dealt with the question of the law to which the Courts of this country would give effect in determining the validity of such agreements. But no such question, and no question of the assignment or transfer *inter partes* in a foreign country of movable property situate here, arises in the present case. If the defendant had been in California after he had purchased or been given the ticket in question, and had assigned his rights to the plaintiff then the following observation in *In re Queensland Mercantile and Agency Co.* (1) would have been in point: "There is another equally well-known rule of law, viz.: that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled." Similarly in *Alcock v. Smith* (2), Mr. Justice Romer said (p. 255): "Generally, the rights of transferor and transferee on a transfer, in one country, of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons

(1) [1891] 1 Ch. 536, at page 545.

(2) [1892] 1 Ch. 238.

living in, or the personal property may be situate in, a foreign country." Referring to the facts of the case actually before the Court the learned Judge said (p. 256): "Indeed, the question here being legally only as to the right to hold the bill (the document itself) as between claimants not parties to the bill, the case is not different from . . . *Cammell v. Sewell* (1)." In the same case (at p. 260) Lopes L. J. refers to the authority in favor of the proposition that a transfer abroad of a document of title is governed by the law of the place of transfer.

These Courts in adjudicating on the title to movable property here have from time to time to consider the validity of different transactions in reference to the property that took place abroad, and in determining that subsidiary question will in certain cases give effect to the law of the country where the transaction took place. That is particularly the case in respect of what are commonly called "universal assignments" (see *Westlake*, 5th ed., p. 193 et seq.). In the present case the assignment, or award of the Court was not any such assignment, but simply an adjudication of the Court which it is sought to make effective here. Mr. Robbins gave evidence that the interlocutory decree for divorce constituted, according to the law of that State, a temporary and provisional contract between the parties. But the Courts of a foreign country do

(1) 5 H. & N. 728; 744; 29 L. J. (Ex.) 350.

not by the fiction of such a contract acquire for their orders any extra-territorial effect that they would not otherwise have.

Consequently there is nothing in the present case to disturb the application of the general principle stated by Mr. Justice Blackburn in *Castrique v. Imrie* (2): "It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the State whose tribunal has pronounced the judgment." (Cf. judgment of Lord Chelmsford, citing Mr. Justice Blackburn, at p. 448.) If that is clear, then it is clear that the plaintiff in this action can have no case, *prima facie* or otherwise, and that, accordingly, this motion, on which a *prima facie* case should be shown, must be refused. In *Castrique v. Imrie* (3) a passage from Story on the Conflict of Laws is cited with approval, and I may quote it here as it deals with a distinguishable class of cases to which I have referred. The principle that the judgment is conclusive "is applied to all proceedings *in rem* as to movable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any

(2) L. R. 4 H. L. 414, at p. 435.

(3) At. p. 428.

other foreign tribunal. This is very familiarly known in the cases of proceedings in rem in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, over which such Courts have a rightful jurisdiction founded on the actual or constructive possession of the subject-matter." In this distinguishable class of cases the Court is giving effect to the judgment of a foreign Court. In the other distinguishable class to which I referred the Court finds itself called upon to adjudicate on the validity of some transaction in a foreign country in accordance with the law of that foreign country and without the benefit of an adjudication by a Court of that country.

Mr. Lavery submitted that the judgment relied on by the defendant cannot be regarded as final, and also that the Court would not enforce a judgment against the public policy of this country. He pointed out, with considerable force, that the judgment relied on transferred all the property of a person domiciled here or in England to a person domiciled in California. It attempted to pauperize the defendant. But long before I could get to the consideration of those points my intellect was cap-sized by the suggestion that, as I have said, the title to all the movable property in Saorstát Éireann is to be at the mercy of the various judicial discretions that any country that can claim to be civilized chooses to bestow on its Courts.

Solicitors for the plaintiff: Hayes & Sons.

Solicitors for the defendant, Francis Patrick McKie: Patrick J. Sheridan & Co.

Solicitor for the trustee defendants: P. J. O'Reilly.

S. V. K.

—The Irish Reports 1933, page 464.

I hereby certify that the attached is a true and correct copy of the report of said case as it appears in 1933 The Irish Reports, at page 464 thereof, published in Dublin, Ireland, by the Incorporated Council of Law Reporting for Ireland.

ORA F. BARNEY

Subscribed and sworn to before me this 7th day of January, 1941.

VALENTINE BROOKES,

Deputy Attorney General of
the State of California.

[Endorsed]: Plaintiff's Exhibit No. 3 for identification. Filed Dec. 16, 1940. O. E. Benham, Clerk.

[Endorsed]: Filed Jan. 9, 1941. O. E. Benham, Clerk.

No. 104

United States District Court, District of Nevada

PLAINTIFF'S EXHIBIT No. 4

for Identification

Filed December 16th, 1940

O. E. Benham, Clerk

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APICELLA AND ANOTHER

v.

SCALA AND OTHERS

Oct. 13-28, Nov. 6, 20-26, Dec. 4, 1931.—Conflict of Laws—Contract—Lottery Acts—Saorstat Eireann Sweepstakes—Contract in respect of—Made in Saorstat Eireann—Made in country where lottery invalid—Right of action in Saorstat Eireann—Offer and acceptance—Purchase of Tickets—Return of counterfoils—Gaming Act, 1845 (8 & 9 Vict., c. 109), s. 18—Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930.

A. C. and S. agreed to combine for the purpose of purchasing and acquiring tickets in the Irish Hospitals Sweepstakes. They purchased a number of books of tickets and entered into a written agreement with regard to them. They decided to acquire more tickets and S. wrote for two more books. He then told A. and C. that he wished to sell some of these tickets to his friends and relatives. A. and C. objected as the

books were for the partnership, and said that if he wanted to sell any tickets to his friends or relatives he should procure another book. He was to be at liberty to sell any tickets he might wish to sell out of such book, and any not so sold were to be taken up by the Partnership. S. agreed to this and wrote accordingly for, and procured, not one but two more books. On the 5th or 15th February, 1931, a written agreement was entered into which comprised the last mentioned two books. Unknown to A. and C., S. retained the previous two books for his own use. One of the tickets in the books so retained by S. drew the first prize in the said Sweepstakes. In an action by A. and C. to recover one two-thirds share of the monies accruing to S. from the purchase, acquisition or ownership of the said winning ticket.

Held, that the purchase of a ticket in such a sweepstake and the sending in of the money and counterfoil was an offer, and not an acceptance of an offer.

Held further, that deciding on the number of books to be sent for was no evidence of intention to contract; the parties did not mean to bargain, but merely arrived at a conditional or revocable decision as to the number of books required for the guidance of the party writing for the tickets.

Held further, that if the arrangement to purchase two books was a contract for some two

books, such contract was certainly discharged by the joint purchase of the two books to which the agreement of the 5th or 15th of February, 1931, was expressed to relate, as there was no appropriation of the two books first procured to that contract. The mere refusal of A. and C. to allow S. to dispose of one of the two books which had been procured was not a determination that the transaction should relate to those particular books in any event.

Held further, that the book of tickets which contained the winning ticket was, as a mere chattel, the property of A., C. and S., and was of some value; S. did not derive the prize from the use of the book, but by chance and as a subscriber to the Sweepstake; and therefore the bare ownership of the book did not entitle A. and C. to share in the prize money.

Effect of Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930, in legalizing Lotteries, discussed.

The plaintiffs were Antonio Apicella and Matteo Costantino, Italian Nationals, resident in England. The defendants were Emilio Scala, also an Italian National, resident in England; the Trustees for Statutory Deposits of Prize Money under the Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930, and the Associated Hospitals Committee for the Running of Sweepstakes under the Provisions of the said Act. Under and by virtue of that Act, a sweepstakes was held in Saorstat

Eireann upon a horse-race known as the Grand National, run on the 27th March, 1931. The tickets were sold in books, each containing 12 tickets of a face value of 10/- each, at the price of £5 for each such book, or singly at the price of 10/- for each such ticket. One of the tickets so sold bore the distinguishing letters and numbers F/M.H. 22370. By the terms of the said Sweepstakes the owner or owners of this said ticket became entitled in the events which happened to receive payment in cash of a sum of £354,724 and upwards from the defendant Statutory Trustees. The said ticket was bought by the defendant Emilio Scala, whose name was on the counterfoil, and who paid by cheque for the book containing it. Before the result of the Sweepstakes became known he sold one three-fourth share of the said ticket at the price of £10,500, and retained the remaining one-fourth share. The present action was brought by the plaintiffs to recover a sum of about £60,000, being one two-third share of all monies accruing to the defendant Emilio Scala from the purchase, acquisition or ownership of the said ticket F./M.H. 22370, which, they alleged, was bought by him as agent for and on behalf of himself and each of the plaintiffs. Prior to the happening of the events in dispute the plaintiffs and the defendant Emilio Scala purchased and acquired two books of tickets in the said sweepstakes on their joint account as co-adventurers, as to which said tickets a written agreement was drawn up and signed by all three on January 8th, 1931.

The facts in dispute on which the plaintiffs relied are set out in the following paragraphs of the statement of claim:

12. On or about the 15th day of January, 1931, the plaintiff, Antonio Apicella, having secured information as to persons in Dublin to whom application with a view to purchase and acquisition of tickets could be made, verbally and with the assent of the said Matteo Costantino requested the said Emilio Scala, to whom he communicated the said information, to apply accordingly with a view to the purchase and acquisition of further books of tickets for the joint account of the said Antonio Apicella, Matteo Costantino and Emilio Scala, and the said Emilio Scala verbally agreed * * * to make such application and purchase and acquire further tickets accordingly: the said agreement is hereinafter referred to as the second verbal agreement.

14. In pursuance of the second verbal agreement, the said Emilio Scala applied for and purchased and acquired in Dublin from the Hospitals Trust, Limited, two further books of twelve tickets each for the joint account of himself and the said Antonio Apicella and Matteo Costantino at the price of £10, and each of them, * * * on or about the 5th of February, 1931, paid to the said Emilio Scala a sum of £3 6s. 8d. as and for one-third share of the cost of the said two further books of tickets.

15. The said Emilio Scala, having received the said two further books of tickets, represented to the said Antonio Apicella and Matteo Costantino in or

about the last week of January, 1931, that he wished to be allowed to dispose to his friends of some of the tickets so obtained, though uncertain as to how many tickets his friends would buy from him; the said Antonio Apicella and Matteo Costantino declined to allow any of the said tickets to be disposed of, but they verbally proposed, and the said Emilio Scala verbally agreed, that the said Emilio Scala should purchase and acquire at the price of £5 a further book of tickets for the joint account of the said Antonio Apicella, Matteo Costantino, and Emilio Scala, but upon the terms that he, the said Emilio Scala would be entitled to sell to his friends at face value such of the tickets of such further book as he might dispose of among them within a reasonable time and that he would hold for the joint account of himself and the said Antonio Apicella and Matteo Costantino any cash received by him in respect of such sales in excess of the sum of £5 and all such tickets of such further book as should remain in his hands, and that each of them, the said Antonio Apicella and Matteo Costantino, would pay to the said Emilio Scala one-third of the cost (if any) to the said Emilio Scala of all such tickets of such further book as should so remain in his hands; the said agreement is hereinafter referred to as the third verbal agreement.

17. In pursuance of the third verbal agreement, the said Emilio Scala applied for and purchased and acquired in Dublin at the price of £5 from Hospitals Trust, Limited, a further book of 12

tickets for the joint account of himself and the said Antonio Apicella and Matteo Costantino, and informed the said Antonio Apicella and Matteo Costantino of his purchase and acquisition of such further book, but omitted to disclose to them the distinguishing letters and numbers of the tickets comprised in the said book.

18. On or about the 15th of February, 1931, the said Emilio Scala verbally represented to the said Antonio Apicella and Matteo Costantino that certain of the friends of him, the said Emilio Scala, had wished to have, and that he had sold to his said friends, for sums aggregating £5 10s. 0d., all but one ticket (hereinafter referred to as the outstanding ticket) of the 12 tickets comprised in the said further book of tickets so purchased and acquired by him as last aforesaid, and verbally acknowledged and declared to the said Antonio Apicella and Matteo Costantino that he, the said Emilio Scala, held and would thenceforth hold the outstanding ticket for the joint account of himself and the said Antonio Apicella and Matteo Costantino as well as the sum of 10/-, being the profit in cash in the hands of him, the said Emilio Scala, upon the sale as aforesaid to his friends of 11 tickets from the said further book of 12 tickets.

19. (a) On or about the 15th day of February, 1931, it was verbally agreed by and between the said Antonio Apicella and Matteo Costantino and Emilio Scala, for greater certainty, that the contractual position between them, the said Antonio Apicella,

Matteo Costantino and Emilio Scala, with regard to all tickets then held for their joint account (other than the tickets comprised in the agreement of January 8th) should be recorded in writing under their hands; accordingly, by instrument in writing, bearing date the 15th of February, 1931, and executed under the hand of each of them, the said Antonio Apicella, Matteo Costantino, and Emilio Scala, it was agreed by and between the said Antonio Apicella and Matteo Costantino and Emilio Scala that they would share equally all the gains and profits to accrue in the said Sweepstakes from the purchase, acquisition or ownership of any one or more of the tickets bearing the distinguishing letters and numbers C/JK 22453 to 22464, and C/JK 22465 to 22476, and the ticket bearing the distinguishing letters and number F/MH 22370.

(b) Alternatively.

(i.) The plaintiffs repeat paragraph 19 (a), but say that the said instrument does not represent the true intention and agreement of the parties thereto.

(ii.) The said intention and agreement was that the distinguishing letters and numbers of the 24 tickets comprised in the two books of tickets purchased by the said Emilio Scala in pursuance of the second verbal agreement for the joint account of himself and the said Antonio Apicella and Matteo Costantino should (as well as the outstanding ticket) be specified in the said instrument as the subject of the agreement of the parties.

(iii.) The distinguishing letters and numbers of the said 24 tickets were F/MH 22369 to 22380 and F/MH 22381 to 22392, and therefore included the aforesaid ticket bearing the distinguishing letters and numbers F/MH 22370.

(v.) In the course of the writing of the said instrument and before the distinguishing letters and numbers of any tickets were written therein the said Emilio Scala verbally represented to the plaintiffs for the purpose of record in the said instrument that the distinguishing letters and numbers of the said 24 tickets were C/JK 22453 to 22464, and C/JK 22465 to 22476.

(ix.) (a) The plaintiffs say it would be inequitable and contrary to good faith for the said Emilio Scala to profit at their expense by reason of his said untrue statement;

(b) in the alternative the plaintiffs say that the said Emilio Scala made the said statement by mistake and that they, the said Antonio Apicella and Matteo Costantino and the said Emilio Scala, executed the said instrument under a common mistake as to the correct distinguishing letters and numbers of the said 24 tickets; (c) in the further alternative the plaintiffs say that the said Emilio Scala made the said statement fraudulently, either well knowing the same to be false or recklessly and not caring whether it were true or false, and with the intention of inducing the plaintiffs to execute the said instrument with incorrect letters and numbers written therein as the distinguishing letters and num-

bers of the said 24 tickets in lieu of the correct letters and numbers distinguishing the same.

On these facts the plaintiffs claimed (1) A declaration that ticket No. F/M.H. 22370 in the Irish Free State Hospitals Sweepstake on the Grand National and the prize payable in respect thereof is held in common in equal shares by each of the plaintiffs and the defendant Emilio Scala:

(2) A declaration that the defendant Emilio Scala holds the said ticket No. F/M.H. 22370 and entered into the contract with his co-defendants constituted by the purchase and holding of the said ticket as trustee as to two-third share therein for the plaintiffs:

(3) If necessary, rectification of the said instrument in writing, dated the 15th of February, 1931, by the deletion therefrom of the words and figures "C/J.K. 22453 to 22464" and "C/J.K. 22465 to 22476" appearing therein, and by the insertion therein, in lieu of the said words and figures of the words and figures "F/M.H. 22369 to 22380 and F/M.H. 22381 to 22392".

(4) An order that the defendants other than Emilio Scala do pay the prize payable in respect of said ticket to the plaintiffs and the said defendant Emilio Scala in proportions of their respective interests therein: and

(5) A declaration that the defendants other than Emilio Scala hold the prize-money in respect of said ticket or the proceeds of any sale thereof as

trustees for and on behalf of each of the plaintiffs and the defendant Emilio Scala in equal shares.

In his defense, the defendant Emilio Scala denied that any agreement was drawn up or entered into on the 15th February, 1931, as alleged in Paragraph 19 (a) of the Statement of Claim, and pleaded as follows:

Paragraph 39. As a further defense to Paragraph 19 (a) of the Statement of Claim, this defendant says that two books each of twelve tickets bearing the distinguishing letters and numbers of C/J.K. 22453 to 22464 and C/J.K. 22465 to 22476, respectively, were purchased for the joint account of the plaintiffs and this defendant, and that by an instrument in writing bearing date the 5th day of February, 1931, and executed under the hand of each of them the plaintiffs and this defendant, it was agreed in manner in the said instrument, appearing namely as follows:

8 Gilbert Street,
Museum Street,
Holborn, W. C. 1,
Feb. 5th, 1931.

We the undersigned agreed to share equal all the moneys of the Irish Sweepstake, The Grant National—March 27th, 1931, numbers following C/J.K. 22453 to 22464, C/J.K. 22465 to 22476.

(Signed)

APICELLA ANTONIO
M. COSTANTINO
E. SCALA.

Paragraph 40. At some date unknown to this defendant but subsequent to the said 5th day of February, 1931, the following words and figures, namely, "and also ticket number F/M.H. 22370" were fraudulently and falsely interpolated in and added to the instrument referred to in Paragraph 39 of this defense without the knowledge, consent, or approval of this defendant, and the date of the said instrument was fraudulently and falsely altered from "Feb. 5th, 1931" to "Feb. 15th, 1931" by interpolating and inserting the figure "1" immediately after the word "Feb." and immediately in front of the figure "5" without the knowledge, consent, or approval of this defendant.

Paragraph 41. This defendant says that the instrument alleged in paragraph 19 (a) of the Statement of Claim falsely and fraudulently altered as hereinbefore alleged is one and the same instrument as the instrument referred to in Paragraph 39 of this defense which has been fraudulently and falsely altered as aforesaid.

It was agreed by the parties that the facts should be found by the trial judge, before any legal argument should be addressed to the Court. In the course of his findings of fact, his Lordship said:

" . . . I hold that the number of the winning ticket was inserted some time after the result of the draw was known.

“I must now turn to the second branch of the case—the question of whether there was a verbal agreement on which the plaintiffs can maintain this action. Fortunately, on this issue I am not confronted with a mass of conflicting evidence. On the one side I have nothing to deal with but Mr. Scala’s point-blank denial that he ever mentioned anything about an extra ticket or about a book of tickets in his own name. As I have already stated, he evidently, to escape from a difficulty, said that he had mentioned having bought a book of tickets for relatives. But about the book in question he swore he said nothing, and so the plaintiffs were quite in the dark as to when the extra ticket was purchased. Now, as I have already pointed out, it is clear that when the number of the winning ticket was added it must have been known to the plaintiffs that the ticket was purchased before the 15th February. Hence, the facts clearly corroborate the plaintiffs’ story to the extent of there having been some mention of an extra book of tickets or an extra ticket, and Scala’s one piece of evidence goes out and the plaintiffs’ story is left with nothing against it. But in considering the plaintiffs’ evidence I must allow for the fact that their testimony is to a certain extent discredited by the fact that I have found that the number of the winning ticket was added after the draw, and that, consequently, they have made untrue statements on that one point.

But as regards the rest of their evidence they seem to me to have been in general very accurate—and, indeed, that was one reason why I found it so difficult to reject their evidence as to the added number. Besides, while it is apparent that Scala concentrated on denying anything that would support a case for a verbal agreement, the plaintiffs evidently thought that their case depended on the written agreement, and were never in their evidence taking pains to build up a case on a verbal agreement, and important points in their favor only came out casually.

“Now first of all I must hold, as against the plaintiffs, that there was no binding agreement between them and Scala that no book of tickets was to be bought outside the joint adventure by any of the three. Consequently, any book or ticket which was brought into the joint adventure had to be brought in by special agreement. But, in order to explain the conduct of the parties and how, after the purchase of the first three books comprised in the first written agreement, other books came to be added and why Scala was so secretive about some books which he purchased, I should say that I think there is no doubt that the plaintiffs would have regarded a secret purchase as not playing the game, and that Scala thoroughly understood that. This peculiar outlook is difficult to explain, but people do not engage in these joint

gambling adventures without some very irrational motives about luck, and what breaks one's luck and so forth. Besides, behind these peculiar joint adventures there is the operation of a social or club instinct. The combination of three friends in the purchase of a large holding in the Great Sweepstake of which everyone was talking, appealed to this instinct. They were great persons, the three of them together, and the joint adventure cemented the bond of friendship. An independent purchase would be a violation of the spirit of the adventure. In this connection, it must be remembered that the plaintiffs had previously joined in another sweepstake and had won a prize of £500. On that occasion there had been no written agreement, and I have no doubt that the plaintiffs are accurate in saying that they were not anxious for a written agreement and that Costantino in fact disliked the idea. But Scala was much more business-like in his ideas. It is also to be noted that he was the most ambitious of the three in the number of tickets he desired to acquire, and, in fact, he procured two entire books that are clearly outside the joint adventure—although it would not appear that he was as well off as either of the others, certainly as Apicella.

“That being the position, three books were acquired for the joint adventure on the 8th January, and they were the subject of the writ-

ten agreement of that date. On the 15th January the three went to the bank and obtained an address which would enable more tickets to be obtained. It was arranged that two more books were to be purchased, and it was agreed that Scala was to write for them. On the same day Scala and Apicella procured the four tickets through Gonligardi. Two of them were by arrangement taken by Scala for his wife, the other two by Apicella, one for his wife and one for Mrs. Costantino. Scala wrote for the two books of tickets, as arranged, and paid for them. I hold that he then raised the question of selling some of the tickets to his friends or relatives, and that it was objected that the two books were for the partnership and that if he wanted to sell any tickets to friends or relatives he should procure another book, and that he was to be at liberty to sell any he desired out of that book and that any not so sold were to be taken up by the partnership. I hold that Scala agreed to this, and that the meaning of the arrangement was that the book was to be procured on behalf of the joint adventure, Scala having the right of disposal mentioned. The meaning of this arrangement was that the joint adventure would get the benefit of two free tickets, or the purchase money paid for them, together with the seller's rights in respect of the whole book, and, on the other hand, that the partnership would take up any unsold tick-

ets so that the benefits arising from the acquisition of an entire book would be secured. Scala accordingly wrote for and procured, not one, but two more books. It was these two last mentioned books which he produced and it was they that were included in the second written agreement. Of the first two books procured he disposed of eight tickets to his relatives, the other he purchased in his own name. He only informed the plaintiffs that he had procured one extra book, and he represented that he had sold all but one of the tickets. I hold that he consented that this remaining ticket should be comprised in the agreement, and the parties settled between themselves as to the 10/- in respect of the other free ticket. It would seem that when it was agreed that the one remaining ticket should be comprised in the agreement the seller's rights were not specifically mentioned in either of the written agreements.

“Counsel for the plaintiffs will, presumably, contend on the facts as found, the agreement as to an extra book of tickets, and a particular unsold extra ticket, was an agreement that covered the whole book of tickets which included the winning ticket. That, however, is a question as to which I have not yet given any consideration.”

Gavan Duffy, K. C. (with him Finlay, K. C., and Kathleen Phelan), for the plaintiffs.

Scala bought either as partner, co-adventurer or agent of the plaintiffs, and an agent cannot profit in any way from a transaction of this kind. By the principal verbal agreement the parties agreed to buy books of tickets jointly. Scala got two books in pursuance of this agreement and the plaintiffs refused to let him part with those two books. Their property in the books could not be divested by Scala's mistake in putting other numbers into the written agreement without the plaintiffs' knowledge. The plaintiffs by further verbal agreement indemnified him as to one of the two books of the F. M. H. series, and in so far as that one is unidentified through the negligence of Scala, they are entitled to the benefit of both, and Scala is bound to account: Partnership Act, 1890, sec. 29; *Fawcett v. Whitehouse* 1 R & M. 132 at 147; *Taylor v. Salmon*, 4 Mly. & Cr., 134; *Shallcross v. Oldham*, 2 J. & H., 609 at 615; *Chattock v. Muller*, 8 Ch. D 177 at 181, and *Kuhliroz v. Lambert*, (1913), 108 L. T. 565, in which Scrutton, L.J., at p. 567 states the general principle as to agents' profits.

A lottery ticket is as specific as land. There was an appropriation of specific tickets to the contract between the plaintiffs and the defendant Scala. *Miller v. Race*, (1758), 1 Burr. 452 at 457, *Cassaboglon v. Gibb*, 11 Q.B.D. 797 at 806.

With regard to the position under Irish law, the Gaming Acts have nothing to do with this case.

The Public Charitable Hospitals (Temporary Provisions) Act, 1930, was passed *ex abundante cautela*. The construction placed in Ireland on the Gaming Act, 1845, sec. 18 makes it clear that the plaintiffs are entitled to recover their prize in this action, even had the Act No. 12 of 1930 never been passed. The prize was given in a lawful game. Further, they could have sued in the English Courts, had the trustees been willing to appear and accept the jurisdiction, and recovered the prize there: *Irwin v. Osborne* (1856), 5 I. C.L.R., 404 at 406; *Crofton v. Colgan*, (1859), 10 I.C.L.R., 133 at 137.

In this case there was no wager between the Plaintiffs and the Committee of the Sweepstake: *Reg. v. Hobbs* [1898] 2 Q.B., 647 at 655.

An agreement to subscribe to a Sweepstake is not a wager: *Weddle, Beck and Company v. Hackett* [1929], 1 K.B., 321 at 329; *Earl of Ellesmere v. Wallace* (1929), 2 Ch. 1; *Monro v. Kelly*, (1911), 45 I.L.T.R., 179.

Neither wagers nor sweepstakes were illegal at Common Law, and it is not sufficient for the defendant Scala to show that Lotteries are illegal. He must produce a specific enactment rendering illegal what has been done here: *Jenks v. Turpin*, 13 Q. B. D., 505 at 526.

All the old Lottery Acts starting in 1698, were passed for Revenue purposes to protect State Lotteries, and are not to be taken cognisance of by other countries. Being territorial, this lottery legislation only applies to things done in England, un-

less it is otherwise expressly stated: *Martin v. Benjamin* [1907], 1 K. B. 64 at 67; *Moulis v. Owen*, [1907] 1 K. B. 746 at 764; *Bottomley v. Director of Public Prosecutions* (1915), 84 L.J., K.B. 354 at 356; *Macnee v. Persian Investment Corporation*, 44 Ch. D. 306 at 312.

In the 18th century England Ireland was not regarded as a foreign country, and the word "foreign" in such an English Act is not to be construed as including Ireland. cf. in re *Campbell* (1920), 1 Ch. 35. It was not suggested that Ireland could be treated as foreign in *Rex v. Registrar of Joint Stock Companies* (1931), 2 K. B. 197.

The alleged illegality if no defence even under English law in an action by the Plaintiffs against the recipient of money to the Plaintiffs' use on an implied promise to pay: *Tenant v. Elliot* (1797), 1 B. & P. 3; *Farmer v. Russel*, (1798), 1 B. & P. 296 at 299; *Nicholson v. Gooch*, (1856), 5 E. & B. 999 at 1016; *Sharp v. Taylor*, 2 Phillips, 801; *Sykes v. Beadon*, 11 Ch.D. 170; *Smith v. Anderson*, (1880), 15 Ch. D. 247; *Bridger v. Savage*, (1885); 15 Q.B.D. 363; *De Mattos v. Benjamin*, 63 L.J., Q.B. 248; *Hale v. Hale*, 4 Beven 369.

The Defendant Scala is estopped by his conduct from pleading English law in the present case: *Birkinshaw v. Nicholl*, 3 App. Cas. 1004 at 1026.

A Court of Equity will not allow the law of another country to be involved for the purpose of doing injustice between man and man: *Cranstown v. Johnston* (1796), 3 Ves. 170; judgment of Sir Rich-

ard Alden at p. 183; *Mercantile Investment and General Trust Company v. River Plate Trust Loan and Agency Company* (1892), 2 Ch. 303 at 313.

The penal laws of another country cannot be involved to deprive a man of his right to property: *Folliott v. Ogden*, 1 H. Bl. 123 at 125; 126 E.R. On appeal the judgment in that case was affirmed on different grounds, but the same principle was enunciated: *Ogden v. Folliott*, 3 Term. Rep. 726 at 733.

The proper law of the contract is the law of Soarstat Eireann, and not the law of England, and the place where accounts were to be settled is immaterial: *Westlake* 7th Edn. pps. 299, 302 and 304; *Robinson v. Bland*, (1760), 2 Burr. 1077; *British South Africa Company v. De Beers Consolidated Mines Limited* (1910), 1 Ch. 354 at 383; *Saxby v. Fulton* (1909), 2 K.B. 208, 232; *Spurrier v. La Cloche* (1902) App. Cas. 446 at 450.

The dictum of Lord Halsbury in *Re Missouri Steamship Company* (42 C.D. 321 at 336), stated by Professor Dicey with a query (Dicey "Conflict of Laws," 4th Edn. Rule 160, Exception 2 at p. 616), against enforcing a contract made contrary to the positive law of the country where it was made does not apply, because there is no law forbidding subscription to this sweepstakes: in any case it goes too far. cf. *Van Grutten v. Digby*, 31 Beav. 561; *Re Banks* (1902) 2 Ch. 333.

Wood, K.C. (with him Fitzgerald, K.C., and Nolan Whelan) for the defendant Scala:—

A joint ownership cannot exist where one only of the partners buys and pays. In this case Scala bought the book containing the winning ticket for himself, and forwarded his own cheque along with the counterfoils to the Sweepstake headquarters in Dublin, and the plaintiffs had no part in the transaction.

A promise to give a chattel, such as a horse, watch or ticket unaccompanied by transfer or change of possession, as in the present case, is a mere nudum pactum and cannot be enforced by compulsion of law. Scala did not identify the tickets, nor appropriate them to any contract between himself and the plaintiffs, and there was no onus on him to appropriate. *Seath v. Moore*, 11 App. Cas. 350 at 370; *Wait v. Baker*, 2 Exch. 1 at 7; *Ridgway v. Ward*, 14 Q.B.D. 110 at 118; *Noblett v. Hopkinson* (1905) 2 K.B. 214 at 218, 221; *Milroy v. Lord*, 31 L.J. Ch. 798 at 802.

Every contract founded on mutual promises between persons must be obligatory on both parties so that each could maintain an action on it or neither would be bound; for the mutuality of obligations is the very essence of all contracts based on mutual promises. Scala could not have maintained an action against the plaintiffs for a contribution to the purchase price of the book of tickets, and this action against him cannot be main-

tained. *Crow v. Edwards*, Hobarts Reports 6; *Holt v. Ward*, 2 Strange 937.

The consideration on which a contract is based which gives a right of action must move from the plaintiff. The plaintiffs gave no consideration for Scala's agreement to include the outstanding single ticket in the joint adventure, and they cannot maintain an action on foot of that agreement.

The consideration for any contract must be of some value in the eye of the law and must be legal. *Dew v. Director of Public Prosecutions* (1921), 124 L.T.R. 246; *Ranson v. Burgess*, 43 T.L.R. 561; *Hall v. McWilliam*, 85 L.T.R. 239; *Rex v. Smith*, 4 Term Rep. 414.

Even if there was valuable consideration here, it was certainly not legal. *Gorenstein v. Feldmann*, 27 T.L.R. 457.

It was a crime because it was the publication of a proposal in respect of a lottery, making known to each other the existence of the lottery, and proposing to join in a joint adventure in connection with it. This is a criminal act, not only in respect of England, but in respect of this country. *Lockwood v. Cooper* (1903) 2 K.B. 428; *Diggle v. Higgs* (1877) 22 Ex. D. 422, C.A. at 426.

The fact that the enterprise and pastime are both lawful does not change the nature of the wager.

A sweepstake in which the winner is determined by lot or chance is a lottery. *Allport v. Nutt* (1845) 1 C.B. 974; *Gatty v. Field* (1846) 9 Q. B. 431.

The trustees are stakeholders only and there is no privity between them and the plaintiffs. *Jones v. Carter* (1845) 8 Q. B. 134.

With regard to the plaintiffs' claim for rectification, the only claim they can possibly make is the rescission on the ground of mistake, but they are not entitled even to rescission because the mistake, if mistake there was, was a unilateral one and not a mistake common to all parties. *Murray v. Parker* (1854) 19 Bev. 305 at 308; *In re International Contract Company* (1892) 7 Ch. App. 485.

Lavery, K.C. (with him MacFhionnlaoich), for the other defendants.

Finley, K.C., in reply:—

The mutual relations between the partners imports consideration. There was an agreement by each party to subscribe capital. *Lindley on Partnership*, 9th Edn., pps. 51, 72 and 86. The mere agreement was consideration and made a binding agreement as from that date.

There was an appropriation of the two books of the F./M.H. series to the original contract. *Seath v. Moore* (11 App. Cas. 350) and *Wait v. Baker* (2 Exch. 1), are both cases of an appropriation under the Sale of Goods Act, 1893, and have no application to the present case. A distinction must be drawn between appropriation in such cases and appropriation by an agent on behalf of a principal, which is this case.

In the case of a partnership, where any one partner performs certain acts on behalf of the partnership, he does so as agent. Partnership Act, 1890, sec. 5. The appropriation here is governed by *Cassaboglon v. Gibb* (11 Q.B.D. 797), and the case of *Millar v. Race* [(1758) 1 Burr. 45] already quoted is unanswerable. Benjamin on Sale, 6th Edn. p. 384. A relevant authority on the question of election is *Scarf v. Jardine*, 7 App. Cas. 345 at 360.

Accretions to property attach to the ownership of such property. Benjamin on Sale, 6th Edn. p. 451; *Meares v. Collis* [1927] I.R. 397 at 403. The plaintiffs would be entitled, if necessary, to rectification. Lindley on Partnership, 9th Edn. p. 389; *Kerr on Fraud and Mistake*, 6th Edn. p. 497; *Union States of America v. Motor Trucks Limited* [1924] A.C. 196 at 198; *Corley v. Stafford*; and *Campbell v. Corley*, 5 W. R. 646: 44 E. R. 714 at 719.

Also cited: *Lovesy v. Smith*, 15 Ch. D. 655 at 662; *Clerk v. Girdell*, 7 Ch. D. 189; *Beale v. Kyte* [1907] 1 Ch. p. 564 at 566; *Sharp v. Taylor*, 2 Phillips 801.

Meredith, J.:—I am now in a position to deal with the various questions of law that arise on the facts which I have already found and on any supplementary findings at which it was necessary to arrive.

The Hospital Sweep tickets which the Hospitals' Trust, Limited, scatter broadcast over the world

are not to be regarded, in my opinion, as offers to each person into whose hands they may find their way to become a purchaser of the right to have the corresponding counterfoils included in the draw on forwarding the counterfoils and the price of the tickets. If a ticket coming into the hands of a person in England constituted such an offer, the posting in England of the counterfoil and the price of the ticket would constitute a binding contract, and a contract which would be made in England. The ticket is a very useful protection to the purchaser of certain rights, which are defined by reference to the number on the ticket, which corresponds with that on the counterfoil. The ticket is not an offer. It, with the attached counterfoil, is more like a proposal form, and an offer is first made by forwarding the counterfoil with the price of the ticket, the ticket being retained by the purchaser. If the offer is accepted the price of the ticket is retained and an official receipt is forwarded, the contract is thus concluded, and it is one made in Saorstat Eireann. But the offer might be refused. For instance, the number of tickets sold might so exceed expectations that it might be thought advisable not to accept any counterfoils after a date some days earlier than had been announced. Or, if the transmission of the counterfoils was illegal in a particular country, and if the encouragement of breaches of the law in that country were resented, the Manage-

ment, Committee might decide to refuse all counterfoils transmitted from that country. Also, the rights secured by the acceptance of the offer to subscribe, followed by success in the draw, are not secured by ownership of the ticket as a mere bit of paper, but by the purchaser as a subscriber, and the particular subscriber whose name appears on the counterfoil that has drawn a horse. It is quite intelligible to speak of buying or selling a ticket in the sweepstake, but the expressions are loose expressions for what is really much more.

Such being the transaction in which the purchaser of a ticket or book of tickets engages it is not difficult to understand the nature of the so called joint adventure upon which the plaintiffs and the defendant, Scala, at the outset alone intended to embark and the precise matters in respect of which they definitely intended to enter into a binding contract. The joint adventure consisted in the joint purchase in equal shares of books of tickets, the counterfoils attached to which might only be filled with one of their names. Then they definitely intended to contract in respect of any prize-money that might be won in respect of any ticket included in such joint purchase. The two written agreements express contracts of this kind and show clearly what was in the minds of the parties. But where a transaction, which is intended to issue in or be consummated by a binding contract, is carried out by a series of intermediate steps that have to be arranged or agreed upon as

the transaction progresses, a difficult question may easily arise. Does a stated agreement or unanimity as to some intermediate step, or a decision to take such a step, with a view to putting the parties in a position to enter into the binding contract, which is the goal of the whole transaction, itself constitute a preliminary or intermediate contract binding on the parties, or is it a mere revocable step towards the contemplated contractual position? Do the parties intend during the progress of the transaction to dig themselves in by means of successive contractual entrenchments, and consolidate their advance as a decision is reached on this or that intermediate step? That may be a difficult question to decide on the facts of any particular case. In the present case, when the parties left the bank on the 15th January, after having ascertained that they would have to write to Dublin for books of tickets, the question of the number of books intended to be purchased naturally arose. It was arranged that two more books were to be purchased, and it was agreed that Scala was to write for them. When the books were obtained it would certainly be open to any of the parties to raise some objection to the two particular books procured, as, for instance, on the ground that they were unlucky for this or that absurd reason. So there would still have to be the final contract, in respect of two definitely approved books, on the lines of the written agreement in fact subsequently entered into, which, like the written agreement of 8th Janu-

ary, set out the numbers of the tickets. Did the parties intend in the meantime to enter into a binding contract that there was to be a joint purchase at all events of some two books? If there was an intention to exchange mutual promises and definitely to contract, then I see no difficulty in finding good consideration. But in my opinion there was no intention to contract. The parties did not mean to bargain; they merely arrived at a conditional or revocable decision for the guidance of the person who was to write to Dublin for books of tickets. Why the parties were so particular on this and other occasions about only writing for the precise number of books they thought they would require I do not know; but probably they thought that the more books sent the greater the chance of detection and interception. But, as their procedure was only to ask for as many books as they thought they would require it is easy to understand how they might discuss how many books were to be purchased without intending to bind themselves by a contract. The position is analogous to the common case of agreements between a vendor and a purchaser, say as to the price of a house, where it is made clear that everything is subject to a formal contract to be prepared by the respective solicitors.

Mr. Gavan Duffy and Mr. Finlay, in their extremely able arguments for the plaintiffs, strenuously maintained that the arrangement arrived at on leaving the bank to purchase two books of

tickets was a definite contract between the parties. Here I may recall the fact that Mr. Scala, with characteristic foresight, absolutely denied that Mr. Costantino was present when this alleged contract was made, but I have held that that was one of the points on which he was clearly inaccurate. On the basis of this alleged contract counsel built up an ingenious case. They contended that the two books actually procured were appropriated to this contract, so that the contract became one to purchase, not some two books, but those two particular books. This appropriation occurred, when Mr. Scala informed the plaintiffs that he had obtained the two books, and the plaintiffs refused to allow him to sell to his friends or relations any tickets from those two books on the ground that they were for the partnership, and Mr. Scala acquiesced. That being the position, it was contended that the money which the plaintiffs paid on the 5th February was for shares in the tickets in those two books, and that those two books, and not the two books subsequently procured by Mr. Scala, should have been included in the second written agreement, which the plaintiffs say was in fact entered into on the 15th February. Accordingly they pray that the agreement should be rectified by the Court by substituting the numbers of the tickets in the two books intended to be comprised in the agreement in place of those actually inserted. This in effect says, that when the number of the winning ticket was fraudulently inserted at the side of the docu-

ment a blunder was made, owing to the plaintiffs being ignorant of the fact that the winning ticket belonged to one of the two books which they had said were for the partnership, and that the Court should now rectify the mistake—a most unfortunate mistake, but for which the plaintiffs would not have had occasion to commit any fraud at all. I always try to appreciate the points of view of litigants on both sides, and I quite understand how the plaintiffs feel doubly aggrieved by reason of the fact that Mr. Scala not alone induced them by misrepresentations to agree to the insertion of the wrong numbers into the agreement, but betrayed them into committing a most regrettable fraud. However, there is a principle that a person coming into equity should come with clean hands; and I consider that the standard of cleanliness required by these Courts is more exacting than what the humble prayer of the petitioners seems to imply. Further, I think that on plaintiffs' contention their claim should rather be for rescission on the ground of misrepresentation than for rectification. But it is not necessary to sidetrack the plaintiffs on any of these technical points. For, first of all, the ground is cut from under the plaintiffs' feet by my decision that the arrangement as to purchasing two books was not a contract. Secondly, if it were a contract for some two books, that contract was certainly discharged by the joint purchase of the two books to which the agreement of the 5th or 15th February was expressed to re-

late, unless there had been appropriation of the two books first procured to that contract. I hold there had been no such appropriation. For the mere refusal of the plaintiffs to allow Mr. Scala to dispose of one of the two books that had been procured, and which would presumably be required for the contemplated transaction, was not a determination that the transaction should relate to those two particular books in any event.

The plaintiffs also sought to establish a title to the book containing the winning ticket on the strength of what was referred to as the third verbal agreement. By this agreement the scope of the original adventure was extended. This was the verbal agreement in pursuance of which Mr. Scala was alleged to have consented to allow the number of what proved the winning ticket to be inserted into the margin of the second written agreement. I may refer to my previous findings in respect of that agreement.

“Scala wrote for the two books of tickets, as arranged, and paid for them. I hold that he then raised the question of selling some of the tickets to his friends or relatives, and that it was objected that the two books were for the partnership, and that if he wanted to sell any tickets to friends or relatives he should procure another book, and that he was to be at liberty to sell any he desired out of that book and that any not so old were to be taken up by the partnership. I hold that Scala agreed

to this, and that the meaning of the arrangement was that the book was to be procured on behalf of the joint adventure, Scala having the right of disposal mentioned. The meaning of this arrangement was that the joint adventure would get the benefit of two free tickets, or the purchase money paid for them, together with the seller's rights in respect of the whole book, and, on the other hand, that the partnership would take up any unsold tickets so that the benefits arising from the acquisition of an entire book would be secured. Scala accordingly wrote for and procured, not one, but two more books. It was those two last mentioned books which he procured and it was they that were included in the written agreement."

It is easy to see that in respect of the more complicated arrangement under this third verbal agreement it was necessary to operate on a contractual basis from the start. It could not be left open to Mr. Scala to wait until he saw how many tickets he was able to dispose of, and if he could only dispose of a few, say he was dealing with the book for the partnership, which would then be liable to take up a number of unsold tickets, but if he was able to dispose of most of the tickets, say he was operating on his own account, and take the benefit of the two complimentary tickets. The moment a ticket from one of the two books was sold the book was appro-

priated to the contract. Accordingly I hold that the book of the F/M.H. series out of which Mr. Scala had disposed of eight tickets were appropriated to the agreement, and if one of the four tickets which Mr. Scala had taken out in his own name had proved the winning ticket it seems to me that the plaintiffs would have had a good claim. Those four tickets should in fact have been brought in to the second written agreement. But I fail to see how the third verbal agreement could be made the basis of a claim to the book containing the winning ticket.

A further contention went to the root of what the plaintiffs probably most acutely felt to be their grievance. The two books of the F/M.H. series were procured for the partnership and the plaintiffs refused to allow Mr. Scala to dispose of them. They were the property of the partnership, and the plaintiffs' rights could not be divested by Mr. Scala procuring two other books of tickets and including them in the second agreement. The plaintiffs had a right to be told that Mr. Scala still had two books on hands belonging to the partnership. If they had been told this they would probably have said that if Mr. Scala desired to purchase them they would have joined in the purchase. Mr. Scala was only able to claim the prize-money because he had dealt with their joint property on his own private account. The benefit he derived from the use of their property was, it was contended, the natural benefit to be expected, or at least hoped for, from such use.

Counsel referred to sub-section (1) of Section 29 of the Partnership Act, 1890, which provides that:

“Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business.”

Counsel cited numerous authorities, but they did not throw much light on the question of whether the benefit in the present case could be said to be derived from the use of the partnership property. *Taylor v. Plumer* (3 M. & S., 562) seems more in point. In that case Lord Ellenborough, C.J., said: “An abuse of trust can confer no rights on the party abusing it nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect of the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is michievous in principle, and supported by no authorities of law.”

That case only shows that it is not a relevant argument to say that when Mr. Scala took two books of tickets in his own name that he had no authority and that he could not have bought them without being authorised by Apicella. That is neither here nor there. Whether Mr. Scala had authority or not

if benefit was derived from that purchase the absence of authority does not constitute the dividing line or break the chain of derivation of profit.

In *Walton v. Butler* (29 Beav. 428), a ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt. It was held that the firm had no interest in the ship, or any lien on it for the amount of the purchase money. Sir John Romilly, M.R., held that the ship was not partnership property in fact, but the following passage shows what would have been his view of it had been partnership property:

—“I at first supposed that this was a partnership chattel, though registered in the name of one partner only, in which case I should have been strongly inclined to think that the plaintiff would have been entitled to follow it.”

The plaintiffs thought they could follow their counterfoils into the draw, and follow the winning counterfoil until it was drawn from the big drum and made Mr. Scala the winner of the first prize. The plaintiffs seem to look on the ticket as something fated to win, and they seem to think that Mr. Scala, when he used the counterfoil, appropriated the partnership fate to his own account.

Now, to begin with, I must hold that the book of tickets which contained the winning ticket was, as a mere chattel, the property of the plaintiffs and the defendant, Scala. Also it had some value, since the first three books had to be purchased at a premium

of 10/- each. If someone who had found it difficult to procure a book had paid Mr. Scala 10/- for the book, Mr. Scala would have had to account for that profit. Also, Mr. Scala did not derive the benefit of the prize from the use of the book, as the plaintiffs say, containing the winning ticket, but by chance—a chance which he obtained as a subscriber to the Sweepstake. The chance of the draw, purchased by Mr. Scala on his own account, broke the chain of derivation from the use of the book. The plaintiffs might as well say that if a firm owned a garage, and a member took a car belonging to the firm to drive to the Curragh Races, and at the races won a hundred pounds by a bet on a horse, he would have to account for what he won if he could not have got to the races without using the car. But the hundred pounds would be derived from the bet, not from the use of the car. Similarly, as the ticket itself cannot be regarded as something fated to win, Mr. Scala did not derive his title to the prize-money from the use of the ticket, but by chance and as a subscriber to the Sweepstake. It is not possible to trace to any particular causal origin what blind chance draws from the shuffle of the big drum. Hence the bare ownership of the book of tickets as a chattel in no way entitles the plaintiffs to share in the prize-money.

Although the plaintiffs are not entitled to any share of the prize-money, it would be open to me to make the declaration sought as to the ownership of the chattel considered as a mere chattel. The

matter is entirely one of discretion, as the parties were certainly co-owners of that bit of paper. Having regard to the defendant Scala's strenuous denial that the book was procured for the partnership, and his denial of the third verbal agreement, and, as he should not have used the book that was joint property without giving the plaintiffs the opportunity of coming in, I would be inclined to make the declaration. But, as the plaintiffs had only sought the declaration with a view to enforcing a certain contract, I would decline to make the declaration, if the contract was one that could not be enforced having regard to the Lotteries Acts.

The first question to be determined is whether the contract in question is governed by the law of England or that of *Saorstát Éireann*. In the argument at the hearing, contracts between the plaintiffs and the defendant Scala were not, I think, sufficiently distinguished from contracts between either the plaintiffs or the defendant Scala with the Management Committee in reference to the purchase of tickets. The latter contracts were, as I have held, concluded in *Saorstát Éireann*, and obviously contemplated the application of the *Saorstát Éireann* law, and consequently were *Saorstát Éireann* contracts. But that did not make every contract between parties in respect to these Sweepstake contracts *Saorstát Éireann* contracts. It would not, for instance, make the contract between Mr. Scala and Mr. Bendir, under which Mr. Scala disposed of

three-quarters of his ticket, a Saorstat Eireann contract. Then, the written agreements between the plaintiffs and the defendant Scala do not immediately suggest anything that to my mind makes it clear that Saorstat Eireann law was in contemplation.

In this connection it must be remembered that the mere fact that something to be done under the contract would be legal in Saorstat Eireann but illegal in England is not sufficient to show that the parties intended the contract to be governed by the law of Saorstat Eireann. It is therefore necessary to consider the precise contract in question. Having regard to my findings, I think that the contract in question should be taken to be the contract, called the third verbal agreement, as to an additional book out of which Mr. Scala might dispose of as many tickets as he desired to his friends and relatives, and the residue were to be taken up by the three co-adventurers. I have held that the book of the F/M.H. series of which Mr. Scala disposed of eight was appropriated to this contract. Was, then, the contract in reference to this book one that contemplated English or Saorstat Eireann law? This precise question was not argued at the hearing, but it seems to me to have been assumed on both sides that the contract had reference to Saorstat Eireann law. But I do not see that the fact, that what was to be done by Mr. Scala would acquire rights for the benefit of the partnership under a contract between him and the Managing Committee that would be a

Saorstat Eireann contract, has much bearing on the contract between the plaintiffs and Mr. Scala. This contract was made in England, and the precise acts to be performed by Mr. Scala, in pursuance of the contract, as well as any payment by the plaintiffs, were all acts to be performed in England. Consequently, unless there is some strong countervailing reason, I think the contract should be regarded as an English contract. (See *In re Missouri Steamship Co.*, 42 Ch. D. 321). But as there are considerations that could be urged on the other side, and as it seems to have been assumed that the contract was a Saorstat Eireann contract, I shall deal with the question on that basis.

The broad question then is: Will the Courts of Saorstat Eireann enforce contracts which are to be performed by breaking the laws which other countries have found it expedient to make in the interests of good government? Every civilised country has a right to work out the problem of good government within its own territory in its own way—and God knows it is a sufficiently difficult problem. The whole world is today groaning under the weight of that problem. Are our Courts to respect the efforts of such other countries to discharge their duty, or are they to be made the instrument of subverting such efforts? To my mind only one answer is possible to that question. Our Courts will not enforce such contracts except where they have in any case been expressly validated by our legislation.

It is hardly necessary to point out that it was presumably because the plaintiffs knew that the contract which they were seeking to enforce could not be enforced in England, because of the illegal acts to be performed under it, that this action was brought in these Courts, and it is obvious that if actions of this type can be successfully maintained in this country, Dublin will rapidly become the gambler's cockpit of Europe. I see nothing in the Public Charitable Hospitals (Temporary Provisions) Act, 1930, to encourage the idea that such a result was intended. Hence, if we desire to be cosmopolitan, let us be so by paying a cosmopolitan regard to the principles of international law.

The contract that the plaintiffs had sought to enforce was one the primary object of which was to secure for the joint adventure the benefit of the two complimentary tickets to be secured partly by the sale by Scala of tickets to his friends and relatives and also to secure the benefit of the seller's rights in respect to such sales. The book of tickets was to belong to the partnership; and Mr. Scala was to be the agent of the partnership for effecting such sales.

Under Section 41 of the Lotteries Act, 1823, the performance of this contract in the manner contemplated would involve the offence of selling. *The King v. Registrar of Joint Stock Companies* [1931], 2 K.B. 197. There is in fact abundant evidence that offences under the Act were intended, and that the parties were anxious that every precaution should be taken, not for the purpose of

avoiding infringements of the law, but for the purpose of escaping detection. In *Waugh v. Morris* (L.R. 8 Q. B. 202), at p. 207, Blackburne, J., said:—

“We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks*, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell v. Robinson*, ‘for the express purpose of a violation of the law.’ . . . We quite agree, that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not.”

That the Public Charitable Hospitals (Temporary Provisions) Act, 1930, contains nothing to validate a contract under which the offences mentioned are to be committed seems clear.

Sub-section (3) of Section 3 of the Act only legalises the holding of the lottery. It has in view the provisions of the various Lotteries Acts under which, but for this Act, the holding of the lottery would be illegal. This enactment would not protect things done even in Saorstat Eireann which are illegal under the existing law and not necessary to the holding of a sweepstake in accordance with the provisions of the Act, except in the case of acts which a statute only makes illegal when committed in respect of an unauthorized sweepstake.

It is doubtful if the Act was intended to have any extra territorial effect whatever. The only other provision that might seem relevant is sub-section (5) of Section 4. But it only secures the payment of the prizes to the prize-winners by the trustees in case they are not paid by the Management Committee. There is certainly nothing in this provision to validate contracts that contemplate violation of the laws of other countries. To hold that such contracts will not be enforced by the Courts of Saorstat Éireann is simply to hold that this provision must be allowed to carry the whole burden that it seems to be intended to carry. Indeed, the object of this action was to prevent the immediate operation of this provision by the simple handing over of the prize-money to Mr. Scala. There is certainly nothing in the Act to prevent this simple provision of the Act itself being carried out without further question.

I shall, therefore, decline to make any declaration as to the bare ownership of the ticket on the ground that the declaration was only sought for the purpose of enforcing a contract for the performance in England of Acts in violation of Section 41 of the Lotteries Act, 1823.

My decision on the serious issues of fact in dispute and as to the merits of the case, while it explains the grievances which the plaintiffs felt as to Mr. Scala's unauthorized use of the book of tickets belonging to the three parties, gave Mr. Scala the satisfaction of a finding that the plain-

tiffs had no claim whatever at law or in equity to participate in his winnings. The action must, therefore, be dismissed.

Solicitors for the plaintiffs:—Corrigan and Corrigan.

Solicitors for the defendant, Emilio Scala: Taylor, Son and Robinson.

Solicitors for the defendant Trustees and Committee:—Ruttledge and MacFhionnlaoich.

—The Irish Law Times Reports,
Vol. LXVI, page 33.

I hereby certify that the attached report is a true and correct copy of the report of said case as it appears in The Irish Law Times Reports, Vol. LXVI, at page 33 thereof, published in Dublin, Ireland, by John Falconer.

ORA F. BARNEY.

Subscribed and sworn to before me this 7th day of January, 1941.

VALENTINE BROOKES,
Deputy Attorney General of the State of California.

[Endorsed]: Plaintiff's Exhibit No. 4 for Identification. Filed December 16, 1940. O. E. Benham, Clerk.

[Endorsed]: Filed Jan. 9, 1941. O. E. Benham, Clerk.

In the District Court of the United States of
America, in and for the District of Nevada

No. 104

PEOPLE OF THE STATE OF CALIFORNIA
on the relation of Charles J. McColgan, as
State Franchise Tax Administrator,
Plaintiff,

vs.

JOHN HOWARD BRUCE,
Defendant.

OPINION AND DECISION

Norcross, District Judge.

This is an action to recover an amount of income tax in the sum of \$4,345.84, alleged to have accrued in 1937, while defendant and his wife were residents of the State of California, by reason of defendant, then becoming entitled to the sum of \$70,000.00, as the proceeds of a winning ticket in the so-called Irish Sweepstakes, payment therefor being subsequently made to defendant in the State of Nevada.

A primary question to be determined is that of jurisdiction. By the pleadings, the question of jurisdiction is presented in a number of respects. The Amended Complaint alleges: "This Court has jurisdiction because this is a controversy between citizens of two states involving an amount in excess of \$3,000. Charles J. McColgan is a citizen of the

State of California and defendant * * * a citizen of the State of Nevada. * * * this is an action for taxes. Jurisdiction is founded on section 24(5) of the Judicial Code * * * (28 U. S. C. A. Sec. 41(5)). * * * because Article IV, section 1 of the United States Constitution, commonly known as the full faith and credit clause, compels it to exercise jurisdiction." The answer denies these allegations excepting in respect to the citizenship of Charles J. McColgan and defendant.

As having a bearing on the question of jurisdiction, paragraph II of the amended complaint and the answer thereto are, also, here quoted:

"That Charles J. McColgan is the duly appointed, qualified and acting Franchise Tax Commissioner of the State of California and as such is authorized by law to administer the California Personal Income Tax Act (Statutes of California 1935, page 1090, as amended.)

"That section 28 of said act provides in part as follows:

'Foreign Action. The Commissioner may bring an appropriate action (whether in the form of a common law action of debt or action), in any court of competent jurisdiction in the United States or in a foreign country, in the name of the people of the State of California, to recover the amount of any taxes and interest due under this act. The Attorney General or the counsel for the

commissioner of this State must prosecute such action.'

"That Earl Warren is the duly elected, qualified and acting Attorney General of the State of California and as such is authorized by law to prosecute this action, and the State of California is one of the sovereign states of the United States."

The answer thereto reads:

"Defendant admits the allegations contained in paragraph II of the plaintiff's complaint, except that he specifically denies that Charles J. McColgan, as State Franchise Tax Administrator, is authorized by law to prosecute this action. In this connection defendant alleges any and all moneys received by Charles J. McColgan, as State Franchise Tax Administrator, are the property of the State of California, and said McColgan has no right or duty therein, save and except to receive and to keep in his possession moneys for the State of California."

The salient facts of the case are that in the year 1936, while defendant and his wife were residents of the State of California, defendant purchased, from his earnings, a ticket in the Irish Sweepstakes which ticket later drew a horse. Thereafter defendant sold a half interest in the ticket to a New York Syndicate for \$5000.00. About May 26, 1936, the race was run and the horse drawn by the said ticket

won first place entitling the holders of the ticket to the first prize of \$150,000.00. Payment was not immediately made to defendant for his interest by reason of suit instituted by one William Leathe in Ireland who, also, claimed a half interest in the winings. This case was finally settled by an agreement that an amount be paid to Leathe and his attorneys in the sum of \$10,642.84. In May 1937, not later than May 5th, defendant and his wife left the State of California and established their residence in Nevada, since which time, they have continuously so resided and are now such residents.

Defendant, after establishing his residence in Nevada, made arrangements with the First National Bank in Reno to handle the collection of any balance payable on account of said winning ticket. On June 24, 1937, such collection was made by said Bank and the amount thereof \$59,356.66, less charges, costs, and an advance of \$50.00, theretofore made to defendant, was deposited to the credit of defendant and his wife, the net amount of such deposit being the sum of \$59,242.64. In 1938, defendant and his wife each made income tax returns to the United States Collector of Internal Revenue at Reno, Nevada, on one half of the gross returns so received, \$29,646.32, and paid the tax assessed thereon.

This case clearly should be treated as a suit brought by the State of California as the real party in interest and not as a suit between citizens of different states. Robertson, State Revenue Agent, v.

Jordan River Lumber Company, 269 Fed. 606; Hertz v. Knudson, 6 F. (2d) 812, 815. This suit being one to recover a judgment for taxes, the recent decision of the Supreme Court of the United States in *Massachusetts v. Missouri*, 308 U. S. 1, appears to sustain the view that this Court has jurisdiction of the pending action. See, also, *Milwaukee County v. White Co.*, 296 U. S. 268; *Hertz v. Knudson*, *supra*. It is the conclusion that this Court has jurisdiction.

The next question presented for determination is the time when defendant became liable to a tax by reason of his ownership in said ticket—did said liability occur while he was a resident of the State of California or not until after he became a resident of Nevada? The income tax law of the State of California follows generally the provisions of the Federal income tax law. It is not contended that the rules applicable to its interpretation would vary from those applicable to the Federal statute, upon the contrary, it is conceded that the construction placed on similar provisions are controlling. In the opinion of the Supreme Court in *Helvering vs. Horst*, delivered November 25, 1940, 311 U. S., 61 S. Ct. 149, appear the following statements:

“From the beginning the revenue laws have been interpreted as defining ‘realization’ of income as the taxable event rather than the acquisition of the right to receive it. And ‘realization’ is not deemed to occur until the income is paid. * * *.

“In the ordinary case the taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued. But the rule that income is not taxable until realized has never been taken to mean that the taxpayer, even on the cash receipts basis, who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor.”

There is nothing in the case now before this Court which brings it within any exception to the general rule above quoted. There is nothing in this case even remotely suggestive that defendant had “fully enjoyed the benefit of the economic gain represented by his right to receive income” prior to “the receipt of it by the taxpayer.” See *People v. Rosen*, 11 Cal. (2) 147. The rule applicable here is that of “the ordinary case.”

Defendant being a resident of the State of Nevada at the time he received payment, he was not liable to any income tax thereon to the State of California. Defendant is entitled to judgment accordingly.

It is so ordered.

Dated this 22nd day of March, 1941.

(Signed) FRANK H. NORCROSS

District Judge

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiff and Appellant, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the court entered herein, designates as the record on appeal the following:

1. The Agreed Statement of the Case, agreed to by the parties as constituting part of the record, and

2. All the proceedings relating to the offer in evidence of the reports of the two Irish court decisions, entitled McKie v. McKie and others, Plaintiff's Exhibit numbered No. 3 for identification, and Apicella and Another v. Scala and Others, Plaintiff's Exhibit numbered No. 4 for identification, including the offer in evidence and the reasons stated, any objections thereto, and the reasons stated, and the ruling of the court thereon, and including also the [2] exhibits themselves, excepting only, in the verified copies substituted for the originals in the case of No. 3, from page 12, line 30 to the bottom of page 15, and in the case of No. 4, from page 14, line 22 to page 21, line 8, inclusive.

Plaintiff and Appellant requests that the clerk of this court cause said record to be prepared and transmitted to the clerk of said Circuit Court of Appeals, as provided in Rule 75 of the Federal Rules of Civil Procedure.

The points on which Plaintiff and Appellant will rely on appeal are as follows:

1. That the court had jurisdiction.
2. That the Personal Income Tax Act of California imposed an income tax on defendant on account of the income concerned herein.
3. That the State of California had jurisdiction to impose the tax.
4. That the tax was due in the amount assessed.
5. That the trial court erred in not admitting in evidence reported Irish decisions as proof of Irish law.

EARL WARREN,

Attorney General of the
State of California.

H. H. LINNEY

Deputy Attorney General
VALENTINE BROOKES

Deputy Attorney General
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed July 3, 1941. [3]

Hartford Accident and Indemnity Company
Hartford, Connecticut

[Title of District Court and Cause.]

Whereas, The People of The State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California has appealed to the United States Circuit Court of

Appeals for the Ninth Circuit from a certain judgment rendered against said People of the State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California in said action in the above entitled court in favor of John Howard Bruce and entered herein on March 22, 1941.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact a general surety business in the State of California and in the State of Nevada, does hereby undertake and promise on the part of the People of the State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California, the Appellant, that said Appellant shall pay all costs if the said appeal is dismissed or the said judgment affirmed, or such costs as the appellate court may award if the said judgment is modified, not to exceed the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound. [4]

It is further stipulated as a part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment

therefor against said surety and award execution therefor, not to exceed, however, the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at San Francisco, California, this 22 day of May, 1941.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

[Seal] By R. A. VAN HORN
Attorney-in-Fact

The premium on this bond is \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 22 day of May in the year one thousand nine hundred and 41, before me, Vincent P. Laguens, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared R. A. Van Horn known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and [5] affixed my Official Seal, at my office,

in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] VINCENT P. LAGUENS

Notary Public in and for the City and County of San Francisco, State of California.

My Commission will Expire March 27, 1945.

[Endorsed]: Filed June 13, 1941. [6]

[Title of District Court and Cause.]

ORDER TRANSMITTING SUBSTITUTED
COPIES OF CERTAIN PARTS OF THE
RECORD TO THE CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

It Is Hereby Ordered, pursuant to request of plaintiff and appellant, that the copies of the Irish decisions of McKie v. McKie and Others, and Apicella and Others v. Scala and Others, numbered respectively Plaintiff's Exhibits Numbers 3 and 4, now on file as part of the record of this case in this court, be transmitted by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Circuit, to be included in the record on appeal therein, and that copies of the same need not be made.

Dated: July 15th, 1941.

FRANK H. NORCROSS

Judge, United States District
Court for the District of
Nevada.

[Endorsed]: Filed July 15, 1941. [7]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

It Is Hereby Ordered, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, that the time for filing the record on appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit, and for docketing the same therein, is extended until August 23, 1941.

Dated this 22nd day of July, 1941.

FRANK H. NORCROSS

Judge

[Endorsed]: Filed July 22, 1941. [8]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S.
DISTRICT COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the above-entitled case, said case being No. 104 on the civil docket of said Court.

I further certify that this transcript, consisting of 14 typewritten pages and numbered from 1 to

14, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, as set forth in the "Designation of Record on Appeal" filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that, pursuant to order of this Court, a copy of which order is made a part of this transcript, [13] there is accompanying this Record on Appeal the substituted copies of the Irish decisions of McKie v. McKie and Others, and Apicella and Others vs. Scala and Others, numbered respectively Plaintiff's Exhibits numbers 3 and 4, for identification.

I further certify that accompanying this Record on Appeal is the original "Agreed Statement of the Case", agreed to by counsel for both parties and approved by this Court.

And I further certify that the cost of preparing and certifying to said record, amounting to \$3.50, has been paid to me by Earl Warren, Esq., Attorney General of the State of California, one of the attorneys for the appellant.

Witness my hand and the seal of said United States District Court this 5th day of August, 1941.

[Seal]

O. E. BENHAM

Clerk, U. S. District Court.

By O. F. PRATT,

Chief Deputy. [14]

[Endorsed]: No. 9885. United States Circuit Court of Appeals for the Ninth Circuit. People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner, Appellant, vs. John Howard Bruce, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Nevada.

Filed August 6, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Earl Warren
Attorney General

State of California
Legal Department

San Francisco, August 7, 1941

Honorable Paul P. O'Brien, Clerk
U. S. Circuit Court of Appeals
P. O. Box 547
San Francisco, California

Re: People of the State of Cal. ex rel McColgan as
State Franchise Tax Administrator

vs.

John Howard Bruce, No. 9885.

Dear Sir:

In compliance with subdivision 6 of Rule 19 of the Rules of Practice of the United States Circuit

Court of Appeals for the Ninth Circuit, Appellant wishes to adopt as his points on appeal the points as stated in the statement of points in the transcript of record, and to designate for printing the entire record certified by the District Court.

Very truly yours,

EARL WARREN,

Attorney General

H. H. LINNEY

Deputy

VALENTINE BROOKES

Deputy

Attorneys for Appellant

VB:FB

Copy to

Axel P. Johnson, Esq.

Attorney for Appellee

[Endorsed]: Filed Aug. 8, 1941. Paul P. O'Brien,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

PEOPLE OF THE STATE OF CALI-
FORNIA, on the relation of Charles J.
McColgan, as State Franchise Tax Com-
missioner,

Appellant,

VS.

JOHN HOWARD BRUCE,

Appellee.

OPENING BRIEF FOR APPELLANT

EARL WARREN,
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No. 9885
IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE
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PEOPLE OF THE STATE OF CALI-
FORNIA, on the relation of Charles J.
McColgan, as State Franchise Tax Com-
missioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT AS TO JURISDICTION

The complaint alleged that the district court had jurisdiction (1) under section 41(1) Title 28 of the United States Code because this is a controversy between citizens of two States involving an amount in excess of \$3,000, exclusive of interest and costs; (2) under section 41(5) of Title 28 of the United States Code, because this is an action for taxes; and (3) because Article IV, section 1 of the United States Constitution, commonly known as the full

faith and credit clause, compelled the district court to exercise jurisdiction. The complaint alleged that Charles J. McColgan is a resident of California and that John Howard Bruce is a resident of Nevada. These allegations (which were not denied, see Record, page 89) are on page 5 of the Transcript of Record. The district court held that it had jurisdiction.

Jurisdiction vests in this Court by virtue of section 225(a) of Title 28, United States Code. Judgment below was entered on March 22, 1941. (Record, page 6.) The notice of appeal was filed on June 13, 1941. (Record, page 7.) Bond on appeal was filed the same day. (Record, pages 95-98.) On July 22, 1941 an order was filed by the district court judge extending the time for filing the record until August 23, 1941. (Record, page 99.) On August 6, 1941 the record was filed in this Court. (Record, page 101.) On August 8, 1941, Appellant filed with the clerk of this Court a designation of record and a statement of points to be relied on in this appeal. (Record, pages 101, 102, 95, 7.)

As the jurisdiction of the district court and of this Court is the subject of extended discussion hereinafter, the above statement is believed sufficient at this point.

STATEMENT OF THE CASE

This is an action on behalf of the State of California to collect income taxes owing by Appellee. Appellee, John Howard Bruce, lived with his wife in California during 1936 and until May 10, 1937, and was a resident of California during that period. Early in 1936 Appellee bought a ticket in the Irish Sweepstakes, and his name appeared on the counterfoil which was sent to the Sweepstakes officials in Ireland. Soon the drawing occurred in Ireland, and Appellee's ticket drew a horse. Then Appellee sold a half interest in his ticket to a New York syndicate for \$5,000, but at all times Appellee kept the ticket in his possession. About May 26, 1936, the race was run and the horse drawn by Appellee's ticket won first place, entitling the holder or holders of the ticket to the first prize of \$150,000. Payment to Appellee of his winnings was not made until June 25, 1937, however, because one William Leathe had filed suit in Ireland claiming a half interest in the winnings. Leathe withdrew his suit for a payment of \$5,000 and payment was then made to Appellee of \$59,356.66. This payment was made to Appellee's account in a Reno bank, as on or about May 10, 1937 Appellee and his wife had left California and had become residents of Nevada.

Appellee actually received only \$59,356.66 of the \$150,000, because \$75,000 was paid to the New York syndicate, \$10,000 was paid to Appellee's attorneys, and \$5,000 was paid to Leathe.

On June 10, 1937, the California Franchise Tax Commissioner, acting under the California Personal Income Tax Act, issued a jeopardy assessment against Appellee, assessing him \$4,345.84 on net income of \$70,000. This tax has not been paid and this action was instituted to collect it.

There are two general issues presented by this case. The first issue is whether the Federal courts have and must exercise jurisdiction in an action brought on behalf of a State against a resident of another State to collect taxes due the former State. The district court held that Federal courts do have such jurisdiction, but held that no tax was due to the State on behalf of which the action was brought. The second issue therefore is whether Appellee owes the tax involved. This issue is subdivided into three problems: one, whether California had jurisdiction to tax; two, whether it exercised that jurisdiction; three, whether the amount of the assessed tax is too large. The latter problem depends for determination on a consideration of Irish law, and this, together with the consideration of whether California had jurisdiction to tax, introduces a subsidiary problem, namely whether the district court should have admitted evidence offered by Appellant to prove Irish law. The offer of evidence was opposed by Appellee on the ground that the court would take judicial notice of Irish law, and the court did not admit the evidence.

SPECIFICATION OF ERRORS

The district court held that it had jurisdiction, and Appellant urges that it held correctly on that issue. One of the points to be relied on by Appellant is that the district court had jurisdiction, but that point cannot be included in Appellant's specification of errors, since the district court decided that issue favorably to Appellant.

The errors committed by the district court from which Appellant asks relief are:

1. The district court erroneously failed to hold that the California Personal Income Tax Act imposed an income tax on Appellee, and in the amount assessed;
2. The district court erroneously failed to hold that California had jurisdiction to impose that tax;
3. The district court erroneously failed to admit in evidence proof of Irish law.

SUMMARY OF ARGUMENT

In the argument hereinafter Appellant will show:
A. That the district court had jurisdiction and that this Court has appellate jurisdiction because:

- I. The United States Supreme Court has held that Federal courts have jurisdiction of actions to collect State taxes, for taxes are not penal obligations;

- II. This action is between citizens of different States and involves over \$3,000, thus coming within section 41(1), Title 28, United States Code;
 - III. This action is one arising under a law providing for internal revenue, thus coming within section 41(5), Title 28, United States Code;
 - IV. Article IV, section 1 of the United States Constitution compels the Federal courts to give full faith and credit to State laws and therefore to enforce this obligation;
 - V. This Court has jurisdiction of the appeal under section 225(a), Title 28 of the United States Code;
- B. Appellee owes the tax which this action was instituted to collect, because:
- I. California had jurisdiction to impose the tax because the income matured while Appellee was a resident of California and also because the income was derived from property in California;
 - II. The California act imposed the tax because it taxed residents on all their net income and nonresidents on all income from California, and treated illicit income as taxable income, and it taxed Appellee in at least the amount assessed because, like the Federal act, it taxed Appellee on all

the income to which he had an enforceable claim and he could have obtained the entire \$150,000 as separate property;

- C. The Federal courts will not take judicial notice of foreign law and therefore the district court should have admitted the offered proof of Irish law.

* * * * *

ARGUMENT

- A. The United States District Court had jurisdiction of this action, and this Court has jurisdiction of this appeal
- I. The United States Supreme Court has held that Federal district courts have original jurisdiction in actions by States to collect taxes due from nonresidents

In two decisions the United States Supreme Court has held that the Federal district courts have jurisdiction in actions of this character. These decisions are *Massachusetts v. Missouri*, 308 U. S. 1, 60 Sup. Ct. 39, and *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 Sup. Ct. 229.

In *Massachusetts v. Missouri*, supra, a State instituted an action in the United States Supreme Court against residents of another State to collect taxes. The United States Supreme Court refused to exercise jurisdiction because relief was available in other courts, among them the Federal district courts.

In *Milwaukee County v. M. E. White Co.*, supra, the United States Supreme Court held that a Federal district court had jurisdiction of an action brought by a State subdivision to collect a judgment for State taxes. The court held that full faith and credit must be given to a judgment for taxes, and held that such a judgment is not penal in nature for the obligation to pay taxes is not penal. While this case involved an action to enforce a judgment for taxes, in the later case of *Massachusetts v. Missouri*, supra, the United States Supreme Court cited *Milwaukee County v. White* as authority in a case where an action was instituted to collect taxes and not to collect a judgment for taxes.

Thus the jurisdiction of the Federal district courts in this type of case has been upheld by the Supreme Court.

II. The Federal district court had jurisdiction because this is an action between citizens of different States involving an amount in excess of \$3,000

Title 28, section 41(1) of the United States Code¹ conferred jurisdiction on the district court in this case. While a State is not a citizen of itself and hence does not come within the terms of the grant of jurisdiction,² an action instituted by State officers on behalf of a State is within the grant of

¹ "The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and . . . (b) is between citizens of different States . . ."

² *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192.

jurisdiction.³ While an action against a State officer where a State is the real party in interest is treated as an action against the State in construing the prohibition of the Eleventh Amendment,⁴ the fact that a State is the real party in interest in this case did not deprive the district court of jurisdiction because there is no constitutional prohibition against a State's instituting suits in the Federal courts. On the contrary, clause 1 of section 2 of Article III of the Constituion confers jurisdiction on the Federal courts in actions by a State against the citizens of other States. Thus the rule that the application of constitutional provisions is governed by substance, not form, does not compel a relinquishment of jurisdiction in this case because a State officer is suing on behalf of his State.

Section 28 of the California Personal Income Tax Act⁵ authorizes the Franchise Tax Commissioner to bring this action. Thus he is the qualified moving party and as such is a party to the controversy. His interest in the recovery is not purely formal, for the act imposes on him the duty of enforcing the tax,⁶ and requires that all taxes due

³ *Missouri, K & T. Ry. Co. v. Missouri Railroad etc. Com'rs.*, 183 U. S. 53, 22 Sup. Ct. 18; *Ex Parte Nebraska*, 209 U. S. 436, 28 Sup. Ct. 581.

⁴ *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *Ex Parte Young*, 209 U. S. 123, 28 Sup. Ct. 441.

⁵ "The commissioner may bring an appropriate action (whether in the form of a common law action of debt or indebitatus assumpsit, or a code or other action), in any court of competent jurisdiction in the United States or in a foreign country, in the name of the people of the State of California, to recover the amount of any taxes and interest due under this act. The Attorney General or the counsel for the commissioner of this State must prosecute such action."

⁶ Sec. 32. "The commissioner shall administer and enforce the tax herein imposed"

under it shall be paid to the commissioner,⁷ and also names the commissioner as statutory defendant in actions to contest any disputed tax.⁸ In consequence, the commissioner is comparable to the administrator of an estate, and the decisions that the citizenship of the administrator of an estate is controlling in determining jurisdiction under section 41(1)⁹ support the conclusion that the citizenship of the commissioner is the controlling factor. The fact that the action is entitled "People of the State of California on the relation of McColgan" does not compel a contrary conclusion.¹⁰ Thus the requisite diversity of citizenship exists and the terms of section 41(1) are satisfied.

As this action involves an amount in excess of \$3,000, exclusive of interest and costs, it is an action of which the Federal district court had jurisdiction on the ground of diversity of citizenship. As we pointed out in the preceding portion of this brief, the fact that the action is for State taxes does not remove it from the scope of section 41.

⁷ Sec. 14(d). "The tax . . . imposed by this act, shall be paid to the commissioner . . ."

⁸ Sec. 21. " . . . any taxpayer . . . may bring an action against the commissioner for the recovery of . . . the amount paid."

⁹ *Childress v. Emory*, 8 Wheat. 641, 669; *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Coal Co. v. Blatchford*, 11 Wall. (78 U. S.) 172, 20 L. Ed. 179; *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193; *Mexican Cent. Ry. Co. v. Eckman*, 187 U. S. 429, 23 Sup. Ct. 211.

¹⁰ *State of Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186.

III. The Federal district court had jurisdiction because this is an action arising under an internal revenue law

Title 28, section 41(5) of the United States Code provides that:

“The district courts shall have original jurisdiction . . . of all cases arising under any law providing for internal revenue.”

This provision conferred jurisdiction over this action on the district court, for this is a case arising under a law providing for internal revenue.

The term “internal revenue” is probably found in this country only in Congressional enactments. It designates taxes such as income, estate, inheritance, sales and manufacturers taxes, and its purpose is to distinguish such taxes from import taxes. As the States may not impose import taxes whereas Congress may, all State taxes are internal revenue taxes whereas not all Federal taxes are.

The section (41(5)) does not confine itself expressly to Federal internal revenue taxes; on the contrary it applies to “*all* cases arising under *any* law providing for internal revenue.” Thus the section grants jurisdiction to the district courts over cases arising under State laws providing for internal revenue.

The only ground on which a conclusion contrary to the foregoing one could be reached would be that the term “internal revenue” when used by Congress refers only to Federal taxes. This restric-

tive interpretation is refuted, however, by the fact that Congress uses the term “internal revenue” in relation to the taxes imposed by the Territories. Thus in section 3 of the Organic Act of Puerto Rico, 44 Stats. 1418,¹¹ Congress referred to the Territorial tax laws of the Territorial government as “internal revenue” laws. This demonstrates that in using the term “internal revenue” in section 41(5) Congress was not using a term restricted by custom to Federal taxes. The term is applicable and is used by Congress with regard to taxes imposed by Territorial legislatures. As States and Territories are comparable in this connection, it follows that “internal revenue” legislation includes State tax legislation. Thus the California income tax law is a “law providing for internal revenue,” and this action, arising under it, is an action over which the district court had jurisdiction.

IV. The Federal district court had jurisdiction because the full faith and credit clause of the United States Constitution compelled it to exercise jurisdiction

Article IV, Section 1 of the United States Constitution, commonly known as the full faith and credit clause, provides as follows:

“Full faith and credit shall be given in each State to the public acts, records, and judicial

¹¹ The pertinent portions of this act and of a Congressional report regarding it are set forth in a footnote in the report of *West India Oil Co. v. Domenech*, 311 U. S. 20, at pp. 30 and 31, 61 Sup. Ct. 90, and also in the Appendix to this brief.

proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

This provision applies to State statutes and judgments alike,¹² and consequently the provisions of State statutes are entitled to full faith and credit in the courts of other States and also in Federal courts sitting in other States.¹³ Tax laws are not penal laws, and therefore they are within the scope of the full faith and credit clause.¹⁴ Thus the California Personal Income Tax Act is entitled to full faith and credit in the Federal court sitting in Nevada.

The effect of the full faith and credit clause is, of course, to compel the State and Federal courts to enforce obligations created by statutes of other States. Thus the Federal courts must enforce the tax obligation which the California Personal Income Tax Act imposed on Appellee.

The authority to institute this action which is bestowed by California statute¹⁵ on the commissioner is entitled to full faith and credit. The authority to sue in courts of other States, bestowed

¹² *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571; *Broderick v. Rosner*, 294 U. S. 629, 55 Sup. Ct. 589. See also, *Chicago & Alton R. R. v. Wiggins*, 119 U. S. 615, 662, 7 Sup. Ct. 398; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415; *Clark v. Williard*, 292 U. S. 112, 54 Sup. Ct. 615; *John Hancock Mutual Life v. Yates*, 299 U. S. 178, 57 Sup. Ct. 129.

¹³ *Bradford Electric Light Co. v. Clapper*, supra, Note 12; *Milwaukee County v. M. E. White Co.*, supra.

¹⁴ *Milwaukee County v. M. E. White Co.*, supra; 28 *Cal. Law Rev.* 507. The latter source contains an excellent recent survey of the problem and of the authorities bearing upon it.

¹⁵ Supra, Note 1.

by State laws on State officers and State appointed receivers, has been held by the United States Supreme Court to be an authority which the courts of the other States are bound by the full faith and credit clause to recognize.¹⁶ As the Federal courts are also bound by the full faith and credit clause,¹⁷ it follows that the Federal courts may not refuse to recognize the commissioner's capacity to sue.

Moore v. Mitchell, 281 U. S. 18, 50 Sup. Ct. 175, is somewhat inconsistent with the conclusion expressed above. However, *Moore v. Mitchell* did not consider the effect of the full faith and credit clause, and is inconsistent with later decisions in which the United States Supreme Court held that the capacity of a State officer to sue, bestowed by State law, is entitled to full faith and credit.¹⁸ The decision in *Moore v. Mitchell* is likewise inconsistent with the later decisions of *Milwaukee County v. M. E. White*, *supra*, and *Massachusetts v. Missouri*, *supra*, both of which recognized that a State authority may sue to collect taxes in the Federal courts sitting in other States. *Moore v. Mitchell* must be regarded as impliedly overruled. However, it may be distinguished from the instant case by the fact that the Indiana statute involved in *Moore v. Mitchell* did not expressly authorize bring-

¹⁶ *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415; *Clark v. Williard*, 292 U. S. 112, 54 Sup. Ct. 615; *Broderick v. Rosner*, 294 U. S. 629, 55 Sup. Ct. 589.

¹⁷ See cases cited *supra*, Note 13.

¹⁸ *Clark v. Williard* and *Broderick v. Rosner*, *supra*, Note 16, are more recent decisions than *Moore v. Mitchell*.

ing suit in other States, whereas the California statute does.

Congress may not create courts otherwise competent and refrain from giving them jurisdiction over actions of this nature.¹⁹ Thus if Congress made a positive effort to withdraw from its courts jurisdiction over actions to collect State taxes, while at the same time it vested those courts with jurisdiction over actions to collect Federal taxes and with jurisdiction over all suits instituted by the United States or an officer thereof, that effort would be unavailing. The full faith and credit clause would compel the Federal courts to exercise jurisdiction in this case, since they are competent to enforce revenue laws and to enforce claims of sovereigns. Therefore even if section 41 of Title 28 could not be construed to have conferred jurisdiction over this action on the Federal district court, the full faith and credit clause would confer that jurisdiction.

V. This Court has jurisdiction of the appeal

Under Title 28, section 225(a) of the United States Code this Court has jurisdiction of all appeals from the Federal district courts except those appeals which go directly to the United States Supreme Court. This case is not of the class in which appeal lies directly to the Supreme Court, so this Court has jurisdiction of the appeal.

¹⁹ *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371; *Broderick v. Rosner*, 294 U. S. 629, 55 Sup. Ct. 589.

B. Appellee owes the tax which this action was instituted to collect

I. California had jurisdiction to impose the tax

The district court concluded that Appellee did not owe any tax to California, apparently because that court was of the opinion that California lacked jurisdiction to tax since Appellee became a non-resident of California shortly before he received the actual proceeds of his winnings. (Record, pp. 92 and 93.) If the district court's conclusion were correct, the path to widespread avoidance of State income taxes would be opened wide.

To appreciate fully the effect of the district court's decision, the essential facts should be briefly reviewed. Appellee and his wife were residents of California in 1936 when Appellee bought a ticket in the Irish Sweepstakes, when the race was run and when Appellee's horse won the race, entitling the holder of the ticket to the first prize of \$150,000. Later, in 1937 and about a month and a half before the winnings were actually paid to Appellee, he and his wife left California and established their residence in Nevada. Thus at the time when Appellee's income came into being he was a resident of California.

California had jurisdiction to tax Appellee in 1936 and until May 10, 1937 on all his income,

including any from other States or countries.²⁰ California could have taxed Appellee in 1936 on income which had accrued to him but which had not yet been paid to him. The winnings from the Irish Sweepstakes could properly have been treated by California as accrued income in 1936 when the race was run and the holder of the ticket (Appellee) became entitled to the proceeds.²¹ Thus California could have taxed Appellee in 1936 on his winnings.

Having had jurisdiction to impose an income tax on Appellee's winnings at the time when they first became income,²² California did not lose jurisdiction to tax merely because it conditioned the imposition of the tax on an event which occurred in another State,²³ or because the tax was not assessed until Appellee had become a resident of another State.²⁴ Thus the tax is one which California had jurisdiction to impose on Appellee.

The jurisdiction to impose this tax on Appellee is likewise supported by the rule that a State can tax nonresidents on their income derived from

²⁰ *Lawrence v. State Tax Comm.*, 286 U. S. 276, 52 Sup. Ct. 556; *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 57 Sup. Ct. 466.

²¹ The accrual in this case as of the completion of the running of the race is clearer and more in accord with recognized accounting concepts of accrual than were the accruals in the cases of *Helvering v. Enright Estate*, -- U. S. --, 61 Sup. Ct. 777, and *Pfaff et al. v. Com'r.*, -- U. S. --, 61 Sup. Ct. 783. Yet jurisdiction to tax as accrued income was upheld in these cases. Likewise, the case for the accrual of these winnings in 1936 is clearer than the accrual in *Fawcus Machine Co. v. U. S.*, 282 U. S. 375, 51 Sup. Ct. 144.

²² See cases cited *supra*, Note 21.

²³ *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246.

²⁴ *Scobie v. Wis. Tax Comm.*, 225 Wis. 529, 275 N.W. 531; see also *Continental Assurance Co. v. State of Tenn.*, 311 U. S. 5, 61 Sup. Ct. 1, and *Wisconsin v. J. C. Penney Co.*, *supra*, Note 23.

within its borders.²⁵ The income of Appellee from the Irish Sweepstakes ticket may be regarded as being in this category, for it matured or accrued at the time that the race was run, and at that time the ticket was in California. The ticket was the source of the income, because income does not exist in the abstract but only by identification with its owner or recipient, and Appellee would not have received this income had he not possessed the ticket.²⁶ The ticket, property in California, created income, because it gave the holder the right to certain proceeds which constituted income. (Cf. *Miller v. McColgan*, 17 A. C. 466, 110 Pac. (2) 419.) This income California had jurisdiction to tax even though paid to a nonresident.²⁷ In this aspect the case is not materially different from a case where a nonresident owns certain tangible personal property in California, such as a diamond ring, which he sells for a profit. Clearly that profit would be taxable by California.

We believe the instant case is in all aspects comparable to one where a resident of California sells a diamond ring located in California, and then

²⁵ *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221; see also *Hughes v. Spaeth*, 207 Minn. 577, 292 N.W. 194, and *Jackling v. State Tax Comm.*, 40 N. Mex. 241, 58 Pac. (2) 1167.

²⁶ The possessor of the ticket was entitled to the winnings. Under Irish law the holder of the ticket is entitled to the winnings regardless of whether he was the original purchaser and regardless of contracts to the contrary between the holder and third parties if the purchase of the ticket and the formation of contracts regarding it are unlawful were made. *Apicella et al. v. Scala*, Irish High Court, Record pp. 44, 69, 81, 84. Such purchases and contracts are unlawful in California (Penal Code Sections 319-326, 337a(6) and confer no rights enforceable in the California courts. *People v. Rosen*, 11 Cal. (2) 147, 78 Pac. (2) 727.

²⁷ *Shaffer v. Carter*, supra, Note 25, and *N. Y. ex rel Whitney v. Graves*, 299 U. S. 366, 57 Sup. Ct. 237.

removes to Nevada and causes the proceeds to be paid to him there. We believe that in such a case California could show jurisdiction to tax both because of its power to tax all the income of residents and because of its power to tax income of nonresidents from sources within its borders. In the instant case California has the same jurisdiction to tax.

II. The California Personal Income Tax Act imposed the tax in the amount assessed

Although Appellee's income came from a transaction made unlawful by California law²⁸ this income nevertheless constituted taxable income within the definition of income in the Personal Income Tax Act. Section 7(a) of that act defines gross income²⁹ in substantially the same terms as section 22(a) of the Internal Revenue Code.³⁰ The definition of gross income in the Federal act has been held to include illicit gains,³¹ and the California statute is to be interpreted similarly.³²

Section 5 of the act imposes a tax on the "entire net income of every resident" of California and on the "net income of every nonresident which is

²⁸ Penal Code sections 319-326, 337a(6), and section 3 of Act 3421, Deering's General Laws. These are set forth in the Appendix. See also *People v. Torrey*, 16 Cal. App. (2) 470, 60 Pac. (2) 900.

²⁹ The text of this section may be found in the Appendix.

³⁰ The similarity of the State and Federal acts has been commented on by the California Supreme Court in *Holmes v. McColgan*, 17 A. C. 460, 110 Pac. (2) 428.

³¹ *U. S. v. Sullivan*, 274 U. S. 259, 47 Sup. Ct. 607, 51 A.L.R. 1020.

³² The *Sullivan* case was decided in 1927 and the California act was enacted in 1935. Under these circumstances the California courts regard themselves bound by the Federal interpretation. *Union Oil Associates v. Johnson*, 2 Cal. (2) 727, 43 Pac. (2) 291, 98 A.L.R. 1499; *Holmes v. McColgan*, 17 A. C. 460, 110 Pac. (2) 428.

derived from sources within'' California. As the discussion in the preceding division of this brief demonstrates, Appellee is taxed both because income accrued to him while he was a resident and because he received income which was produced by property located in California at the time that it produced the income.

The tax which was assessed against Appellee was in the amount of \$4,345.84, on a net income of \$70,000. The recovery prayed in the complaint is for the amount of the tax, plus additions for Appellee's failure to pay it on time.

The amount of the assessed tax is not too high; in fact, if it is incorrect at all the assessment is too low.

The ticket held by Appellee was on the winning horse, and the holder of the ticket became entitled to \$150,000. The entire \$150,000 could well have been regarded as taxable income to Appellee, although he did not in fact receive that much.

The selling of the ticket was in violation of the law of California and under California law Appellee acquired nothing which the courts of California would enforce.³³ Thus had Appellee lost the ticket or had it been stolen, he would not have been entitled to relief in the California courts. By the same token, however, the New York syndicate to whom Appellee assigned half his rights acquired

³³ *Gridley v. Dorn*, 57 Cal. 78; *People v. Rosen*, 11 Cal. (2) 147, 78 Pac. (2) 727; *Sloss v. Holland*, 38 Cal. App. 318, 177 Pac. 72; *Niccoli v. McClelland*, 21 Cal. App. (2) (Supp.) 759, 65 Pac. (2) 853; *Asher v. Johnson*, 26 Cal. App. (2) 403, 79 Pac. (2) 457.

nothing under the law of California, for Appellee retained possession of the ticket. Neither did the New York syndicate acquire any rights enforceable under the law of New York.³⁴

Under these circumstances the law of Ireland is that the possessor of the ticket (Appellee) became entitled to the entire proceeds, in this case \$150,000, and he, and he alone could have enforced his rights to those proceeds in the Irish courts.³⁵ Thus the New York syndicate did not receive the \$75,000 because it had an enforceable right to that sum but only because Appellee permitted the syndicate to receive it. The entire sum to which Appellee had an enforceable right constituted income to him even though he permitted some of it to be paid to another.³⁶ Appellee is thus taxable on the entire winnings even though he made a gift of half of it to the syndicate by permitting the syndicate to collect half.

Even if the \$150,000 which constituted income to Appellee as holder of the ticket were regarded as community income, half of it or \$75,000 would be taxable to Appellee, and as the assessment was on \$70,000 the assessment is not too high.

However, none of the winnings constituted community income. Although the ticket may have

³⁴ *Goodrich v. Houghton*, 134 N. Y. 115; 31 N.E. 516; *Thatcher v. Morris*, 11 N. Y. 437, 111 N. Y. Ct. App. Rep. 123; *Rolfe v. Delmar*, 30 N. Y. Super. 80.

³⁵ *Apicella et al. v. Scala et al.*, High Court of Ireland, Record p. 44.

³⁶ *Lucas v. Earl*, 281 U. S. 111, 50 Sup. Ct. 241; *Burnet v. Leininger*, 285 U. S. 136, 52 Sup. Ct. 345; *O'Donnell v. Com'r.*, 64 Fed. (2) 634; *Helvering v. Horst*, 311 U. S. 112, 61 Sup. Ct. 144; *Helvering v. Eubank*, 311 U. S. 122, 61 Sup. Ct. 149.

been community property, it was in the name and possession of Appellee and therefore under Irish law he was entitled to the proceeds to the exclusion of his wife.³⁷ Thus the proceeds were his separate income taxable to him as such. This conclusion is not shaken by the fact that when Appellee received the proceeds his wife thereupon acquired community property rights which she might be able to enforce against Appellee in Nevada.³⁸ Thus Appellee was taxable on the winnings as separate income, not as community income. He was therefore taxable on \$150,000 if the amount paid to the New York syndicate be treated as a gift, and otherwise he was taxable on \$75,000. In either event, the assessment was lower so any error is in Appellee's favor.

Neither the payments to the syndicate, to Leathe nor to the attorneys were deductible as business expenses, for Bruce was not engaged in a business of buying Sweepstakes tickets.³⁹ Therefore no deductions could be taken to reduce the taxable net income below the \$70,000 which was included in the assessment.

From the foregoing it may be seen that the assessed tax is imposed by the act.

³⁷ *McKie v. Rt. Hon. Earl of Granard*, Irish High Court, Record p. 14.

³⁸ See cases cited *supra* Note 36, in each of which the same was true of the income involved. See also *Clifford v. Helvering*, 309 U. S. 331, 60 Sup. Ct. 554.

³⁹ *Van Wart v. Com'r.*, 295 U. S. 112, 55 Sup. Ct. 660; *Higgins v. Com'r.*, 312 U. S. 212, 61 Sup. Ct. 475.

C. The reports of the Irish cases should have been admitted into evidence

At the trial, Appellant offered in evidence the reports of the Irish cases of *Apicella et al. v. Scala et al.* and *McKie v. Rt. Hon. the Earl of Granard*, which are reproduced on pages 44 and 14, respectively, of the Transcript of Record. The proceedings in this connection at the trial are set forth from page 9 to page 12 of the Transcript of Record. Commencing on page 10 it appears that Mr. Linney, acting for Appellant, offered the reports in evidence. Mr. Johnson, attorney for Appellee, on the ground that “under the procedure in Nevada” one cannot “read any law to the jury,” objected “to the introduction as evidence in this case [of] any decisions of courts of Ireland or any other foreign country.” Mr. Linney then stated that the evidence was offered because the court would not take judicial notice of Irish law. The court then stated that the cases “could be considered better as a question of law.” Subsequently the cases were received for identification, but the court did not permit them to be admitted in evidence.

It is well settled that the Federal courts do not take judicial notice of the law of foreign countries and hence such law must be proved.⁴⁰ While it is not easy to tell precisely what Appellee’s attorney

⁴⁰ *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445, 9 Sup. Ct. 469; *Coghlan v. So. Car. R. R. Co.*, 142 U. S. 101, 12 Sup. Ct. 150; *The Silverpalm*, 79 Fed. (2) 598; *Merinos Viesca Y. Co. v. Pan. Am. etc. Co.*, 83 Fed. (2) 240, cert. den. 299 U. S. 547, 57 Sup. Ct. 10; *In re Hannevig*, 10 Fed. (2) 941, cert. den. 270 U. S. 655, 46 Sup. Ct. 353.

meant by his objection that “under our procedure in Nevada we are [not] permitted to read any law to the jury,” presumably he meant that the court should take judicial notice of the Irish law and therefore proof of it was unnecessary. After making such an objection, Appellee would not be in a position to object to this Court’s taking judicial notice of Irish law. However, the objection should have been overruled and the evidence received since the rule is clear that judicial notice may not be taken of foreign law. On appeal this Court may, of course, consider improperly excluded evidence the same as if such evidence had in fact been admitted, so the cases offered in evidence may be considered as proving the Irish law pertinent herein.

CONCLUSION

This action, to collect State taxes, is within the jurisdiction of the Federal courts and is properly before this Court. The tax which is involved was imposed by a valid statute of California, and is a tax which California had jurisdiction to impose. Therefore the tax obligation should be enforced. Judgment should have been for Appellant as prayed in the complaint; therefore the judgment in favor of Appellee should be reversed.

Respectfully submitted.

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APPENDIX

CALIFORNIA PERSONAL INCOME TAX ACT

Sec. 7. (a) Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, and includes any salary, wages or compensation of any officer or employee of this State, or any political subdivision, district or municipality thereof.

PENAL CODE OF CALIFORNIA

Sec. 319. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known.

Sec. 320. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

Sec. 321. Every person who sells, gives, or in any manner whatever, furnishes or transfers to

or for any other person any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

Sec. 322. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

Sec. 323. Every person who opens, sets up, or keeps by himself or by any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

Sec. 324. Every person who insures or received any consideration for insurance for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal

of any of the purposes aforesaid, is guilty of a misdemeanor.

Sec. 325. All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by information filed, or by any action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the district courts in civil cases.

Sec. 326. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

Sec. 337a. (6) Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every

person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

DEERING'S GENERAL LAWS—ACT 3421

Sec. 3. Said racing board shall have full power to prescribe rules, regulations and conditions consistent with the provisions of this act under which all horse races, upon the results of which there shall be wagering, shall be conducted within the State of California. Said board shall make rules governing, permitting and regulating mutual wagering on horse races under the system known as parimutuel method of wagering, which shall be conducted only by such licensee and only within the enclosure and only on the dates for which such horse racing has been licensed by the board. A wager made inside an enclosure under the parimutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure. All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal.

Licenses. All horse owners, riders, agents, trainers, stewards, starters, timers, judges and others acting as officials at any such racing meeting shall be licensed by the board, pursuant to such rules and regulations as the board may adopt, and by

the payment of a license fee as fixed and determined by said board. All licenses shall be granted for a period of one year and shall be valid at all race meetings in said State during said period. Said licenses shall be subject to revocation and no person shall be eligible to, or permitted to participate in such racing unless so licensed, and only during the time such license remains unrevoked. No qualified person shall be refused such license, nor shall such license be revoked without just cause.

Powers of board. Said board shall have power to compel the production of any and all books memorandum or documents showing the receipts and disbursements of any person, corporation or association licensed under the provisions of this act to conduct race meetings. The board may at any time require the removal of any employee or official employed by any licensee hereunder in any case where it shall have reason to believe that such employee or official has been guilty of any dishonest practice in connection with horse racing and has failed to comply with any condition of such licensee's license, or has violated any law or any rule or regulation of said board. The board shall also have the power to require that the books and financial or other statements of any person, corporation or association licensed under the provisions of this act shall be kept in any manner which to the board may seem best, and the board shall also be authorized to visit, investigate, and place expert accountants and such other persons as it may deem necessary in the offices, tracks or places of business of any such person, corporation or association, for the purpose of satisfying itself that the board's

rules and regulations are strictly complied with. The said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties; and any person failing to appear before said board at the time and place specified in answer to said summons or refusing to testify, shall be deemed guilty of a misdemeanor and, upon conviction in a court of competent jurisdiction, shall be punishable by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court.

SENATE REPORT, No. 1011, 69th Cong., 1st Sess., p. 2:

“In making use of the authority granted by section 3 to levy and collect internal-revenue taxes the government of Porto Rico has found itself unable to collect said taxes on articles purchased in and sent from the United States to Porto Rico by mail, or sometimes when said articles are sent by vessel, as the courts have held that the post-office or customs officials have no authority to withhold [the] delivery of such articles subject to the internal-revenue tax until the tax is paid, as such tax collected in this manner is in effect a customs duty. In other words, the courts have held that the internal-revenue tax can not be collected while the article subject to the tax is in the original package.

“This condition of affairs has practically nullified the power of the insular government to levy

internal-revenue taxes, and therefore the efficacy of this source of revenue has been seriously impaired.

“For the purpose of righting this situation, a new provision is added to section 3, which states as follows:

‘And it is further provided, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: Provided, That no discrimination in rates be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.’

“It is expected that the government of Porto Rico will so make use of this power as not to unnecessarily place any barriers in the way of the free-trade conditions now existing between Porto Rico and the mainland, which is the principal factor in the progress and prosperity of Porto Rico.”

No. 9885

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA, on the
relation of Charles J. McColgan, as State
Franchise Tax Commissioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

BRIEF FOR APPELLEE.

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Attorney for Appellee.

FILED

DEC 30 1941

PAUL R. O'BRIEN,

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No. 9885

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner,	} <i>Appellant,</i>
vs.	
JOHN HOWARD BRUCE,	} <i>Appellee.</i>

BRIEF FOR APPELLEE.

STATEMENT AS TO JURISDICTION.

Appellee contends the Federal District Court was without jurisdiction herein, because:

A. I—(a) One State need not enforce the revenue laws of another;

(b) It is not a controversy between citizens of different States.

II—Sec. I, Article IV of the Constitution does not apply.

III—Jurisdictional amount is lacking.

IV—Federal statutes do not affect State Revenue Laws.

STATEMENT AS TO MERITS.

- B. I—No tax assessment was levied against any property or person of appellant in California.
- (a) The income sought to be taxed was received and realized when appellee was a non-resident of California.
 - (b) The Income Tax law of California exempts income of non-residents, unless source of income was within State, and property had business situs therein.
 - (c) California statute declares income such as sought to be taxed, is not from sources within State.
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SUMMARY OF ARGUMENT.

The judgment of the lower Court should be affirmed because:

1. The Federal District Court was without jurisdiction.
 2. Under the statutes of California, and the facts upon which appellant relies, no tax was due.
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ARGUMENT.

A. I. (a) THE QUESTION AS TO WHETHER THE COURTS OF ONE STATE WILL ENFORCE THE LAWS OF ANOTHER STATE, DEPENDS UPON THE JURISDICTIONAL PRE-REQUISITES AND THE NATURE OF THE ACTION.

In discussing the jurisdictional grounds urged by appellant, we must keep in mind the well settled rule

that United States District Courts are of limited jurisdiction and can exercise jurisdiction only when the controversy in question falls within the general grant of judicial power made by Sec. 2 of Article III of the Federal Constitution and also within the specific grant of a congressional enactment.

“The federal courts are of limited jurisdiction, having jurisdiction only in those specific cases fixed by statute.”

McLaughlin v. Western Union Telegraph Co.,
7 Fed. (2d) 177 at 179;

Nashville v. Cooper, 6 Wall. 247, 252, 18 L. Ed.
851;

Kline v. Burke Const. Co., 260 U. S. 226, 234,
43 S. Ct. 79, 82, 67 L. Ed. 226, 24 A. L. R.
1077.

To the same effect are:

Sheldon v. Sill, 8 How. 441, 12 L. Ed. 1147;

The Sewing Machine Companies, 18 Wall. 553,
577, 21 L. Ed. 914;

Stevenson v. Fain, 195 U. S. 165, 25 S. Ct. 6,
49 L. Ed. 142.

Section 24 of the Judicial Code (Sec. 41, Title 28, U.S.C.A.) sets out the proceedings in which the district Courts have jurisdiction. The material portions of that section are as follows:

“The district Courts shall have original jurisdiction as follows:

(1) . . . First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by an officer thereof authorized by law to sue, or between citizens of the same

State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum of value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. . . .”

Our inquiry is therefore narrowed to the question of whether it arises under the Constitution, laws or treaties of the United States or is between citizens of different States.

Appellant contends first that “The United States Supreme Court has held that Federal District Courts have original jurisdiction in actions by States to collect taxes due from non-residents”. (Appellant’s Opening Brief page 7.)

It is not clear therefrom whether counsel mean that Federal District Courts having jurisdiction by reason of some specific statutory provision are not ousted of such jurisdiction by reason of the fact that the action is brought by a State to collect taxes from a non-resident, or whether they intend to infer that the nature of the action in question in and of itself vested jurisdiction in the lower Court.

While we feel that there is some question as to the right of a Court of competent jurisdiction to entertain an action by a foreign State to collect taxes, we do not deem the matter to be of importance in the case at bar. If, however, appellant is arguing that

the nature of the action is the thing that vests jurisdiction in the Court we must challenge him to point out the portion of the statute which provides that Federal District Courts shall have jurisdiction over such actions.

Appellant relies upon *Milwaukee County v. White*, 290 U. S. 268, 80 L. Ed. 220, and *Massachusetts v. Missouri*, 308 U. S. 1, 84 L. Ed. 3, to sustain its first contention.

In the former case the Court said:

“The relevant facts, as stated by the certificate, are that the appellant, Milwaukee County, a county and citizen of Wisconsin, brought suit in the District Court for Northern Illinois against M. E. White Company, appellee, a corporation and citizen of Illinois, to recover on a judgment for \$52,165.84 which appellant had duly recovered and entered against the Appellee in the Circuit Court of Milwaukee County, Wisconsin, a court of general jurisdiction. . . .”

While the above language speaks for itself and at the risk of repetition we submit that the Court was considering a question where the district Court had jurisdiction by reason of the diversity of citizenship of “Milwaukee County, a county and citizen of Wisconsin” and “M. E. White Company . . . a . . . citizen of Illinois” and that the only question as to jurisdiction was whether or not the action on the judgment for taxes was a suit “of a civil nature” within the purview of the statute.

While the Court held that such judgment was entitled to full faith and credit in Illinois, there is no

suggestion that the jurisdiction of the lower Court was invoked or sustained by reason of anything other than diversity of citizenship and a suit "of a civil nature".

In *Massachusetts v. Missouri* the Supreme Court declined to permit the State of Massachusetts to file an original action in that Court against the State of Missouri and certain citizens thereof. The Court observed that:

"... To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."

The Court then went on to say:

"In this instance it does not appear that Massachusetts is without a proper and adequate remedy... With respect to the character of the claim now urged, we are not advised that Missouri would close its courts to a civil action brought by Massachusetts to recover the tax alleged to be due from the trustees. The Attorney General of Missouri at this bar asserts the contrary. He says that 'it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a federal district court in Missouri', and that 'such a suit would be of

civil nature and would present a justicable case or controversy'."

We submit that the decision is based upon the fact that the State of Missouri did not close its Courts to such an action; that the state Courts provided a proper and adequate forum for the complaining party. Whether the statement of the attorney general of Missouri to the effect that the Federal Courts in that State would entertain jurisdiction of the action was made inadvertently or whether it was made by reason of some federal question involved in that particular controversy, does not appear from the opinion. We submit that the opinion does not overrule the long line of cases holding that a State cannot sue in a Federal District Court by virtue of the fact that it is a State and does not read into the statute words which do not appear therein. It takes more than the admission of a litigant to change a federal statute, the meaning of which has been rendered clear by a unanimity of judicial construction over a long period of years.

We therefore submit that the nature of the instant case is not an independent ground of jurisdiction.

(b) APPELLANT NEXT CONTENTS (APPELLANT'S OPENING BRIEF, PAGE 8) THAT THE LOWER COURT HAD JURISDICTION BY REASON OF THE DIVERSITY OF CITIZENSHIP.

Appellant first states (Appellant's Opening Brief, page 8) that, "a State is not a citizen of itself and hence does not come within the terms of the grant of jurisdiction". With this statement the authorities are in unanimous accord.

Appellant next states (Appellant's Opening Brief, page 9) that Art. III of the Constitution "confers jurisdiction on the Federal Courts in actions by a State against the citizens of other States". To this statement we take emphatic exception. "The judicial power [of the United States] shall extend" to such cases but as pointed out above, inferior Courts of the United States "which are created by statute 'can have no jurisdiction but such as the statute confers'."

Edward Sales Co. v. Harris Structural Steel Co., 17 F. (2d) 155.

The Constitutional provision referred to merely permits the Congress to confer such jurisdiction upon such Courts if it chooses to do so—it has not done so. Appellant then goes on to say that jurisdiction in this case should not be relinquished merely because a state officer is suing in behalf of a State. We submit that appellant is putting the cart before the horse. Jurisdiction must be acquired before it can be relinquished. In order to be acquired it must be specifically authorized by statute.

There are two complete answers to appellant's contention as to diversity of citizenship:

First: The State of California being the real party in interest is the plaintiff in the action and hence jurisdiction cannot be, and has not been, invoked on this ground.

Second: The amount in controversy is less than \$3000.00, as will hereinafter be shown.

The matter of diversity of citizenship was considered at length in the *State of Nevada Ex Rel. City of Reno v. Reno Traction Co.*, 41 Nev. 405, 71 Pac. 375, where the Court was considering a motion to remove the proceeding to the Federal Court. It was there said,

“ . . . The proposition before us may be put thus: If the action is one instituted by the State as the real party in interest against a foreign citizen, the cause is not removable. If the action is one between the city of Reno as plaintiff and a foreign citizen, the cause is removable, and the order prayed for should be entered.”

. . . If the state, exercising its right of control over the streets of the city of Reno, was the real party in interest, and only acted through its agent in the granting of the franchise to the predecessors of the defendant, then we take it that it will not be gainsaid that the state is the real party interested, looking to the carrying out of the terms of that franchise and the enforcement of the ordinance by and through which the franchise was in the first instance granted. In the action at bar the state proceeds in this court on the relation of the city of Reno, but the State of Nevada is the plaintiff and the real party in interest.”

It is, of course, obvious that the State of California is the real party in interest in the instant proceeding. When taxes are collected it is the state that receives them through its agent, the tax collector. He has no personal interest in the funds received and no duty save to collect and hold the same for his principal. We

might well rest our case on this point upon the decision in *M. K. & T. Ry. Co. v. Hickman et al.*, 183 U. S. 53, 46 L. Ed. 78, which is relied upon by appellant. After holding that the state is the real party in interest "when the relief sought is that which inures to it alone" the Court said,

" . . . Such a case was *Ferguson v. Ross*, 3 L.R.A. 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the state. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.

But this case is not like *Ferguson v. Ross*, and does not come within the rule above stated. It is not an action to recover any money for the state. Its results will not inure to the benefit of the state as a state in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate."

See also:

Robertson v. Jordan River Lumber Co., 269
Fed. 606;

and

Hertz v. Knudson, 6 F. (2d) 812.

If, for the purpose of argument, it be conceded that McColgan, Commissioner, is the real plaintiff in this action the law is well settled that he has no capacity to sue outside the State of California.

This precise question has been considered by the Supreme Court in the case of *Moore v. Mitchell*, 30 F. (2d) 600, affirmed in 281 U. S. 18, 74 L. Ed. 673. There the plaintiff as county treasurer of Grant County, Indiana, brought an action in the United States District Court for the southern district of New York. The action was for taxes alleged to be due the county and plaintiff proceeded under a statute which authorized him to

“ ‘institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the state of Indiana or by his legal representatives . . . ’ ”

The Court said:

“The first question for consideration is whether petitioner had authority to bring this suit.

The United States district court in New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of Indiana . . . And, so far as concerns petitioner's capacity to sue therein, that court is not

to be distinguished from the courts of the state of New York . . .

Petitioner claims only by virtue of his office. Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit or to the other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes. And, as Indiana laws are the sole source of petitioner's authority, it follows that he had none in New York . . . He is the mere arm of the state for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside of Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that state. It is well understood that they are without authority, in their official capacity, to sue as of right in the Federal courts in other states. From the earliest time, Federal courts in one state have declined to take jurisdiction of suits by executors and administrators appointed in another state . . . The reasons on which rests this long established practice in respect of executors, administrators and such receivers apply with full force here. We conclude that petitioner lacked legal capacity to sue."

The Circuit Court of Appeals, Second Circuit, in that case, said in part:

"Taxes are imposts, not debts, collected for the support of the government. The form of procedure to collect them cannot change their character. No contractual or quasi-contractual ob-

ligation to pay arises out of the assessment. The enforcement of revenue laws rests not in consent, but on force and authority. *State of Colorado v. Harbeck*, 323 N. Y. 71, 133 N. E. 357. An action for debt cannot be maintained to collect a tax in the New York State courts . . . With the appellees and the property without the State, and the estate being administered in New York, the effort to collect a tax for a political subdivision of Indiana, is repugnant to the settled principles of private international law which precludes one State from acting as a collector of taxes for a sister State, and from enforcing its penal or revenue laws as such. The revenue laws of one State have no force in another. The taxing power of a State is, by the Federal Constitution (Amendment 14) limited to persons and property within its jurisdiction. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 266, 8 S. Ct. 1370, 32 L. Ed. 239 . . .

In *State of Colorado v. Harbeck*, *supra*, it was held that the State Court could not be used to collect taxes due a sister State. The action was brought to recover an inheritance tax upon the estate of Harbeck, a resident of Colorado. He died in New York. The will and codicils were probated in New York, and the taxes were assessed as upon the estate of a non-resident and paid. No provision was made in the accounts finally settled for the payment of transfer tax to the State of Colorado, which had notice of the proceedings in New York. The estate which was assessed for taxation consisted of stocks and bonds, none of which were physically present in Colorado at the time of decedent's death or there-

after. The complaint was dismissed. The tax laws of one State cannot be given extra-territorial effect, so as to make collections through the agency of the courts of another State. Indiana's political subdivision, Grant County, is limited in the payment of taxes to the property found within its boundaries: *State of Iowa v. Slimmer*, 248 U. S. 115, 39 S. Ct. 33, 63 L. Ed. 158; *Ashley v. Ryan*, 153 U. S. 436, 14 S. Ct. 865, 38 L. Ed. 773; *Matter of Anita Bliss*, 121 Mis. Rep. 773, 202 N.Y.S. 185; *Walker v. Treasurer and Receiver General*, 221 Mass. 600, 109 N. E. 674; *People v. Kellog*, 268 Ill. 489, 109 N. E. 304.

In *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239, . . . the Supreme Court pointed out the rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue . . . Under the due process clause of Constitution (amendment 14) Indiana had no jurisdiction to impose a tax, because neither the property nor the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the State to collect such tax."

We here point out that in the case at bar, neither the property nor appellant was in the State of California when the tax was assessed.

The concurring opinion of Circuit Judge L. Hand is in point. He says, in part:

“We must therefore decide whether a tax lawfully imposed in a foreign State can be collected by suit in a Federal Court sitting in another State. Our jurisdiction in this respect is no different from that of a court of the State of New York; the law to be administered is certainly not the law of Indiana, whether it be the law of New York, or whether in such cases there is a common law independent of the laws of any State. Generally, it is, of course, true that a liability arising under the law of a foreign State will be recognized by the Courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum. A recognized exception is in the case of criminal and penal liabilities. (Citing cases). In some few cases, this exception has been extended to include revenue laws as well. (Citing *Colorado v. Harbeck*, *supra*; *Municipal Council of Sydney v. Bull*, (1909), 1 K. B. 7; *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 122 Minn. 266, 142 N. W. 305, 46 L. R. A. N. S. 697; *Canada v. Schulze*, 9 Scotch L. T. 4). But so far as I can find, the point has never been passed on by a Federal Court.

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the ‘settled public policy’ of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy

of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of a Court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own motions of what is proper.”

(Nevada has no State Income Tax Law.)

Counsel attempt to avoid the effect of this decision by stating that the Indiana statute did not purport to authorize the plaintiff to institute the proceeding. We suggest that even a casual reading of the statute, the pertinent portions of which are set out above, clearly shows such authorization. The opinion did not question the sufficiency of the Indiana statute but merely decided that “Indiana is powerless to give any force or effect beyond her own limits to the act . . . purporting to authorize this suit . . .” We submit that California is likewise powerless to give any force

or effect beyond her own limits to the act purporting to authorize the suit at bar.

Counsel also rely upon: *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749; *Clark v. Willard*, 292 U. S. 112, 78 L. Ed. 1160; and *Broderick v. Rosner*, 294 U. S. 629, 79 L. Ed. 1100.

These cases all deal with actions by plaintiffs who were liquidating the assets of insolvent corporations. In each case they appear as quasi assignees or successors in interest to the property formerly owned by the corporation.

The distinction is apparent. The former is merely an agent of the state clothed with no title to the res in controversy. The latter is a trustee empowered to hold and manage the property which he recovers. We submit that *Moore v. Mitchell* is absolutely controlling in a consideration of the case at bar.

Counsel point out (Appellant's Brief page 10) "The Commissioner is comparable to the administrator of an estate . . ." As pointed out in *Moore v. Mitchell*, supra, an administrator has no capacity to sue in a State other than that of his appointment. This is such a firmly established principle of law as to require no argument.

II. SEC. I, ARTICLE IV OF CONSTITUTION DOES NOT APPLY.

Appellant next contends that inasmuch as the lower Court was required to give full faith and credit to the California tax statute by virtue of the federal

constitution and congressional enactments thereunder, the case presents a controversy arising "under the Constitution or laws of the United States".

There are two entirely conclusive answers to this contention.

In the first place the full faith and credit clause and legislation enacted thereunder merely prescribe a rule which must be followed by the Courts; they do not guarantee rights of individuals, the protection of which involves a Federal question.

"The state presents still another view of the question of jurisdiction. Its complaint alleges that if the securities Company be allowed to hold and control the stocks of the Great Northern and Northern Pacific Railway Companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the State. This, it is contended, presents a case arising under article 4 of the Constitution, providing that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state.' . . . We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting. Even if it be assumed that the word 'acts' includes 'statutes,' the clause has nothing to do

with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States.”

Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. Ed. 87.

In the second place it does not appear from the complaint that the full faith and credit clause is involved in this action. It is true that defendant in his answer pleaded a defense which might be said to have called into play this provision of the Constitution, but so far as we have been able to discover the decisions are unanimous to the effect that a federal question must be raised by the allegations of the complaint in order to invest the District Court with jurisdiction. The fact that a defendant's pleading may create an issue, the determination of which involves the construction of the Constitution or a law of the United States does not confer such jurisdiction.

“Where jurisdiction is invoked on the ground that a federal question is involved, it must appear from the plaintiff's own statement of his claim in the declaration, bill, or complaint that the dispute is one which really and substantially involves some right under the constitution, laws, or treaties of the United States. If plaintiff's complaint, petition, declaration, or bill does not show federal jurisdiction it cannot be shown by the answer or any subsequent pleading in the case . . . Jurisdiction cannot be conferred by anticipating a defense which may or probably will be set up by defendant, the maintenance or avoidance

of which involves the determination of a federal question.”

25 *C. J.* 775.

“... Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind.”

Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543;

Tennessee v. Union & Planters Bank, 152 U. S. 454, 38 L. Ed. 511.

“The interpretation of the act which we have stated was first announced in *Metcalf v. Water-*

town, 128 U. S. 586, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173, and has since been repeated and applied in (here the Court cites 17 cases theretofore decided by it) . . .”

L. & N. Rd. Co. v. Motley, 211 U. S. 148, 53 L. Ed. 126.

Appellant states (Appellant's Opening Brief, page 15) that “Congress may not create Courts otherwise competent and refrain from giving them jurisdiction over actions of this nature.

Reliance is placed upon *Kenny v. Supreme Lodge*, 252 U. S. 411, 64 L. Ed. 638, and *Broderick v. Rosner*, 294 U. S. 629, 79 L. Ed. 1100.

These cases hold that a state cannot close its Courts to suits involving the public acts of other States *where such Courts possess general jurisdiction*.

We have no quarrel with the holding of these cases but the vice of appellant's position is that they apply to State Courts of general jurisdiction and not to federal Courts, the jurisdiction of which is limited. As above stated, Congress has plenary power over the jurisdiction of inferior federal Courts. It may grant or withhold jurisdiction exactly as it sees fit. It is true that such a Court is bound to observe the rule laid down by the full faith and credit clause if it is “otherwise competent” to entertain jurisdiction of the action.

III. JURISDICTIONAL AMOUNT LACKING.

The amount sued for is \$4345.84. The recovery prayed in the complaint is for the amount of tax, "plus additions for appellee's failure to pay it on time" (Appellant's Opening Brief, page 20).

Disregarding the penalty features of the amended complaint, the facts agreed upon (Appellant's Opening Brief, page 3) are that the income was obtained and realized in Nevada while plaintiff and his wife were living together as such, and under circumstances which make it community property under the laws of both California and Nevada.

Civil Code of California 1937, Sec. 687 (Deering);

Nevada Compiled Laws 1939, Secs. 3355-3356.

Obviously, therefore, appellee's wife owns one-half the income. If taxable, plaintiff below could not possibly have recovered more than half the sum demanded which is less than the jurisdictional amount.

Upon this point, we call attention to the fact that appellant has filed in the Federal District Court of Nevada a suit against the wife of appellee, asking that if the Court should hold in the case at bar, that the income was community property, that she be required to pay a tax upon her proportionate share thereof.

People of the State of California, et al. v. Gertrude Bruce, Civil Case No. 105, U. S. District Court for the Dist. of Nevada.

It is the duty of the Court to dismiss the suit, when it appears with legal certainty plaintiff could not

reasonably be expected to recover the jurisdictional amount, although pleaded.

Wilderman v. Roth 2d, C. C. A. 17 2d, 486.

“It is the matter in dispute which controls the question of jurisdiction, and parties may not make up simulated matters of controversy to give jurisdiction, nor confer jurisdiction by merely claiming a sum above the jurisdictional amount, when in fact, the true amount is less.”

Edwards v. Bates County, 55 F. 436, 41 L. Ed. 155.

“Where the actual matter in controversy is inadequate in value to confer jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud upon the jurisdiction of the court.”

Bank of Arapahoe v. David Bradley & Co., 72 F. 867, 19 C. C. A. 206.

“In suits for damages, Federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover as much as the jurisdictional amount, and the allegations as to the quantum of damages must in such cases be regarded as merely colorable, and made solely for

the purpose of stating a case apparently within the jurisdiction of the Federal Court as to amount.”

Clement v. Louisville & N. R. Co., 153 F. 979.

“Even in actions of tort, if it appears clearly from plaintiff’s own statement or the testimony of his witnesses that a verdict for the jurisdictional amount would be so excessive as to require the court to set it aside, and grant a new trial, it is its duty to dismiss the case for want of jurisdiction.”

Maxwell v. Atchison T. & S. F. R. Co., 34 F. 286.

“When it appears from plaintiff’s own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not sufficient in value to support the jurisdiction, the case must be dismissed.”

Horst v. Merkely (C. C. Cal.), 59 F. 502.

“What would be a colorable enlargement of a demand, where the law gives no fixed rule, depends upon the facts in a particular case.”

Hayward v. Nordberg Mfg. Co., 85 F. 4, 29 C. C. A. 438.

“Whether plaintiff’s demand for damages was colorable and exaggerated to confer jurisdiction on the court, presents a question for the court to decide, which, if proper to submit to a jury, should be submitted as to the facts, and separate from the merits.”

Mexican Cent. Ry. Co. v. Glover (Tex.), 107 F. 356, 46 C. C. A. 334.

“Jurisdictional amount is determined by what is first demanded, and what pleadings and proof shown as sustaining good faith and validity of demand.”

Home Life Ins. Co. v. Sipp (C. C. A. N. J.), 11 F. (2d) 474.

The rule is further stated here:

“Where there is no cause to suspect that the action is colorable, or brought or prosecuted with the purpose and effect of perpetrating a fraud upon the jurisdiction of the court, and the amount in good faith claimed is within the jurisdiction, the trial court should not remand or dismiss the case *unless, from the nature of the action, it is apparent that the plaintiff cannot recover an amount within the jurisdiction.*” (Emphasis ours.)

Levinsky v. Middlesex Banking Co. (Tex.), 92 F. 449, 34 C. C. A. 452.

“If the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction to the Federal Court, but the Court on motion or demurrer, or of its own motion, may dismiss the suit.”

North American Transportation and Trading Co. v. Morrison, 178 U. S. 262, 44 L. Ed. 1061.

“A claim, to be within the jurisdiction of the court, must be based upon a reasonable expectation of recovering the required amount.”

Nixon v. Town Taxi, 39 F. (2d) 618.

“As regards jurisdiction, the amount in controversy may be shown by pleadings and papers in the case other than the bill, or by evidence.”

Leitch et al. v. City of Chicago, et al., 41 F. (2d) 728.

“A general allegation as to the subject matter being of value sufficient for jurisdiction is not conclusive when the bill carries its own contradiction on its face.”

Cohn v. Cities Service Co., 45 F. (2d) 687.

“An allegation in the bill that the amount in controversy exceeds \$3,000.00 is a mere conclusion of law, subject to be overridden by facts shown by the bill and exhibit.”

Traveler's Ins. Co. of Hartford v. Rabinowitz,
9 Fed. Sup. 353.

IV. FEDERAL REVENUE LAWS NOT APPLICABLE.

Appellant next contends that inasmuch as the complaint alleges that the action is brought to recover a tax debt it shows upon its face that it is a case arising under a law providing for internal revenue and that therefore the Court has jurisdiction under Section 41 (5) U.S.C.A. Title 28.

The words “internal revenue” refer, of course, to federal taxes other than import duties. They do not include State taxes.

“. . . Looking, then, to Sec. 629 of the revised Statutes, we find that by the fourth subdivision the circuit courts have been granted original ju-

risdiction 'of all suits at law or in equity arising under any Act providing for revenue from imports or tonnage,' and 'of all causes arising under any law providing internal revenue.' And again, by the twelfth subdivision, 'of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof.' This clearly implies that the term 'revenue law,' when used in connection with the jurisdiction of the Courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by Sec. 8, Art. I, of the Constitution, 'to lay and collect taxes, duties, imposts and excises.' "

U. S. v. Hill, 123 U. S. 681, 31 L. Ed. 275.

See also,

25 *C. J.* 727.

Appellant cites no authorities and none can be found which hold that State laws imposing taxes come within the provisions of the section above cited. If counsel's position is correct then Federal District Courts have jurisdiction of all actions, regardless of the amount involved, which are brought for the collection of State taxes.

B. ON THE MERITS.

- I. THE INCOME SOUGHT TO BE TAXED WAS NOT REALIZED WHEN APPELLEE WAS A RESIDENT OF CALIFORNIA.
- (a) THE LOWER COURT HELD, RIGHTLY, THAT THERE WAS NO TAX DUE THE STATE OF CALIFORNIA, BECAUSE THE INCOME WAS NOT REALIZED UNTIL AFTER APPELLEE BECAME A RESIDENT OF NEVADA.

“From the beginning the revenue laws have been interpreted as defining ‘realization’ of income as the taxable event rather than the acquisition of the right to receive it. And ‘realization’ is not deemed to occur until the income is paid.”

Helvering v. Horst, 311 U. S., 61 S. Ct. 149.

(Opinion of lower Court, Transcript of Record p. 93.)

“Under the Federal Income Tax Act the Federal Courts have established the principle that ‘income’ within the meaning of the Income Tax Act is ‘realized gain’ and that such realized gain is taxable in the year of its realization regardless of when it accrued.”

Holmes v. McColgan, 110 Pac. (2d) 428, 430.

The tax is not due upon income until it is received.

People v. Rosen, 11 Cal. (2d) 147.

(b) TAX EXEMPTED BY CALIFORNIA STATUTE.

It may be contended by appellant that, conceding appellee was a non-resident when the income was realized, he was liable as a non-resident, for taxes on the source of which was in the State of California.

We cannot concede that the source of the income was in California because the winning ticket was purchased there.

In Ireland, where the transaction would be considered legal, it has been defined by the Courts as a contract, the situs of which is Ireland.

“The ticket is a very useful protection to the purchaser of certain rights, which are defined by reference to the number on the ticket, which corresponds to that on the counterfoil. The ticket is not an offer. It, with the attached counterfoil, is more like a proposal form, and an offer is first made by forwarding the counterfoil with the price of the ticket, the ticket being retained by the purchaser. If the offer is accepted and the price of the ticket is retained and an official receipt is forwarded, the contract is thus concluded, and it is one made in Saorstát Éireann.”

Apicella v. Scala, Irish High Court, Transcript of Record, page 69.

There was no person or property in the State of California upon which the alleged jeopardy assessment of June 10, 1937, could be made.

The State can only levy an assessment upon persons or property within its jurisdiction.

The jeopardy assessment provision of the California act does not presume to operate against non-residents.

California Personal Income Tax Act, Sec. 18.

The jeopardy assessment clause of the act provides for a form of process, which we believe, could not have extra-territorial effect.

Section 7, subdivision (f) of the California Act, provides:

(c) SOURCE OF INCOME NOT IN CALIFORNIA.

“Non-residents. In the case of taxpayers other than residents, the gross income includes only the gross income from sources within this State.”

. . .

“Income of non-residents from stocks, bonds, notes, or *other intangible personal property* shall not be considered income from sources within this State unless the property has acquired a business situs in this State, except that if a non-resident buys or sells such property in this State or places orders with brokers in this State to buy or sell such property so regularly, systematically, and continuously as to constitute doing business in this State, the profit or gain derived from such activity is income from sources within this State irrespective of the situs of the property.”

California Personal Income Tax Act, Sec. 7 (f).

There is no allegation or claim that the income sued upon comes within the exceptions stated above.

We, therefore, respectfully submit that the judgment of the lower Court should be affirmed.

Dated, Reno, Nevada,
October 29, 1941.

Respectfully submitted,

A. P. JOHNSON,

Attorney for Appellee.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
IN AND FOR THE
NINTH CIRCUIT

PEOPLE OF THE STATE OF CALI-
FORNIA, on the relation of Charles J.
McColgan, as State Franchise Tax Com-
missioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

REPLY BRIEF FOR APPELLANT

EARL WARREN,
Attorney General of California,
H. H. LINNEY,
Deputy Attorney General,
VALENTINE BROOKES,
Deputy Attorney General,
600 State Building,
San Francisco, California,
Attorneys for Appellant.

FILED

NOV 7 - 1941

PAUL P. O'BRIEN,

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No. 9885

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

PEOPLE OF THE STATE OF CALI-
FORNIA, on the relation of Charles J.
McColgan, as State Franchise Tax Com-
missioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

FOREWORD

Appellee has not said much that requires answer. Comment is hereinafter made, regarding that portion of Appellee's argument which is not fully answered by the Appellant's opening brief.

ARGUMENT

A. Either the United States Supreme Court or the Federal district courts must exercise jurisdiction in actions of this nature and the United States Supreme Court has held that the Federal district courts have such jurisdiction

Clause 1 of section 2 of Article III of the United States Constitution provides that the jurisdiction

of the Federal courts extends to actions brought by a State against a citizen of another State. As the State of California is the real party in interest in this action, this action is between a State and a citizen of another State within the meaning of this constitutional provision, and within clause 2 of section 2 of Article III which confers original jurisdiction in this class of cases on the United States Supreme Court.

Oklahoma v. Cook, 304 U. S. 387.

Thus the United States Supreme Court was granted original jurisdiction of this class of suits by the Constitution.

The Federal courts were given jurisdiction of actions by a State against citizens of other States "to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens" (*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289.) It would be manifestly improper for the Federal courts, whose judges are sworn to uphold the Constitution, to refuse to exercise the jurisdiction which the Constitution bestows on them. Thus to protect the plaintiff State and to abide by the Constitution, some Federal court must exercise jurisdiction over this action. If the Federal district courts do not have such jurisdic-

tion the United States Supreme Court, which does have it, must exercise it.

Under these circumstances, the decision in *Massachusetts v. Missouri*, 308 U. S. 1, that the United States Supreme Court need not exercise such jurisdiction because the Federal district courts are competent to entertain actions like this one, acquires added significance.

We believe that the foregoing is a complete answer to all that Appellee has said regarding jurisdiction of the Federal courts, except that which is said in connection with *U. S. v. Hill*, 123 U. S. 681, on pages 26 and 27 of Appellee's brief. *U. S. v. Hill* did not interpret section 41 of Title 28. It involved a statute which provided that appeal lay to the Supreme Court "in any action brought by the United States for the enforcement of any revenue law thereof." The court held that an action on the bond of a clerk of a Federal court was not an action for the enforcement of a revenue law. Thus the case has no bearing on the problem presented by this case.

B. As income may be "realized" and taxable even though it is not received by the taxpayer, the fact that the winnings were not received by appellee while he was a resident of California is not an obstacle to Appellee's being taxable on the winnings

Appellee has asserted that he could not be taxed by California because he did not "realize" his income until he had become a resident of Nevada.

Appellee's argument is founded on the misconceived notion that income is not realized until it has been received. Many examples may be offered to show the error in this belief. For instance, income may be realized and taxable when it has accrued even though not all of it will ever be received. (*Spring City Foundry Co. v. Commissioner*, 292 U. S. 182.) Or income may be realized by a taxpayer at the time that it is received by his donee. (*Helvering v. Horst*, 311 U. S. 112.)

In the case at bar, Appellee received the right to the winnings in 1936 while he was a resident of California. Thus the winnings accrued as income at that time. Section 16 of the California Personal Income Tax Act is identical to sections 41, 42 and 43 of the Federal Internal Revenue Code, and recognizes the accrual basis of reporting income. Under subsections (a) and (b) [sections 41 and 42(a)] the Commissioner could have compelled Appellee to report this income and pay a tax on it in 1936. His lenience in postponing the assessment until Appellee had received the income with which to pay the tax does not lessen the jurisdiction of California to exact the tax.

Appellee has otherwise ignored the arguments in Appellant's opening brief. The possible exception is the assertion that section 18 of the Personal Income Tax Act, authorizing jeopardy assessments, does not apply to nonresidents. The provisions of that section are the most eloquent answer to that

assertion, so we respectfully refer the Court to them. They are set forth in the Appendix hereto.

CONCLUSION

The judgment should be reversed and remanded to the district court with instructions to enter judgment for plaintiff as prayed.

Dated: November 7, 1941.

Respectfully submitted.

EARL WARREN,

Attorney General of California,

H. H. LINNEY,

Deputy Attorney General,

VALENTINE BROOKES,

Deputy Attorney General,

Attorneys for Appellant.

APPENDIX

CALIFORNIA PERSONAL INCOME TAX ACT

Sec. 18.

(a) If the commissioner finds that a taxpayer designs quickly to depart from this State or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the commissioner shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and unpaid, whether or not the time otherwise allowed by law for filing the return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section the finding of the commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

(b) If the commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by

this act) and the amount so assessed shall be due and payable upon notice and demand from the commissioner.

(c) If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade tax, for any taxable year, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Sec. 2.

(b) The word “taxpayer” includes any individual, fiduciary, estate, or trust subject to the tax imposed by this act.

10

United States

5

Circuit Court of Appeals

For the Ninth Circuit.

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

Appellants,

vs.

MAKAH INDIAN TRIBE, a corporation, CHARLES E. PETERSON, PAUL PARKER, ARTHUR CLAPLANHOO, JERRY McCARTHY and HAROLD IDES, individually and members of the Council of the Makah Indian Tribe,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,

Northern Division

FILED
DEC - 9 1941

United States
Circuit Court of Appeals

For the Ninth Circuit.

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

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Transcript of Record

Upon Appeal from the District Court of the United States
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Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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In the United States District Court for the Western
District of Washington, Northern Division.

No. 268.

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARK-
ER, ARTHUR CLAPLANHOO, JERRY
McCARTY and HAROLD IDES, individu-
ally and as member of the council of the Makah
Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M.
BENN and GUY BURNHAM,

Defendants.

*Page numbering appearing at foot of page of original certified
Transcript of Record.

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States, for the Western District of Washington, Northern Division:

Come now the Makah Indian Tribe a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, members of the council, and plaintiffs herein, and for cause of action against the defendants, allege as follows:

I.

That the Makah Indian Tribe is a federal corporation chartered under the laws of the United States with headquarters at Neah Bay, Washington, which has completed its organization under said laws and is a recognized and existing Indian organization.

II.

That the governing body of the Makah Indian Tribe, a corporation, consisting of a council known as the Makah Tribal Council or Council of the Makah Indian Tribe, which said council consists of five (5) members as follows, to-wit: Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides.

III.

That all of the members of said Makah Indian Tribe are Makah Indians, and that this action is brought by said corporation and [2] its tribal council for and on behalf of all of the members of the

said tribe and on behalf of all of the Makah Indians by virtue of the power of authority there invested by the constitution and the charter of the said tribe and the laws of the United States under which said corporation was organized and now exists.

IV.

That the individual plaintiffs, in their individual capacity, bring this action on their own behalf and also on behalf of all of the other members of the said Makah Tribe of Indians who are similarly affected by the action of the defendants hereinafter described.

V.

That all of the individual plaintiffs and all of the members of the said Makah Indian Tribe, for and on behalf of whom this suit is instituted, are citizens of the United States; that the Makah Indian Tribe, a corporation, consists of numerous Makah Indians who are duly enrolled and recognized members of said tribe, as will be shown on the records of the Taholah Indian Agency.

VI.

That the defendant B. T. McCauly is the director of the Department of Game and Game Fish in the State of Washington and is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

VII.

That the defendant B. M. Brennan is the director of the Department of Fisheries of the State of Washington and is now a resident of Seattle, King County, Washington, and within the Northern Division of the Western District of Washington and within the jurisdiction of this Court. [3]

VIII.

That the defendant E. M. Benn is an inspector and game protector in the Department of Fisheries and Department of Game and Game Fish of the State of Washington, and is now a resident of Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

IX.

That the defendant Guy Burnham is a game protector in the Department of Game and Game Fish of the State of Washington, and is now a resident of Forks, Clallam County, Washington, within the Northern Division of the Western District of Washington, within the jurisdiction of this Court.

X.

That on the 31st day of January, 1855, Articles of Agreement and Convention were made and concluded at Neah Bay, in the Territory of Washington, between the United States of America, acting through its duly authorized agent and representative, and the Makah Tribe of Indians acting through

its chiefs and head men and delegates of the several villages of said tribe, thereunto duly authorized; that this treaty was ratified by the Senate of the United States March 8, 1859, and accepted and proclaimed by the President of the United States as the law of the land on April 18, 1859, which treaty thereby promised, guaranteed and secured to the members of the Makah Tribe of Indians, and to their posterity and successors in interest the right and privilege of taking fish at the usual and accustomed ground and stations; that at all times since it was originally made and concluded as aforesaid, said treaty has been and still is in full force and effect; that a true and correct copy of said treaty is attached hereto marked "Exhibit A" and incorporation into this bill of complaint by this reference.

[4]

XI.

That this cause of action arises under the aforesaid treaty of the United States with the Makah Tribe of Indians.

XII.

That from time immemorial, the Indians of the Makah Indian Tribe were accustomed to fish in the Hoko River, from its mouth up to the spawning grounds of the fish in said river, in Clallam County, State of Washington, and that from time immemorial the whole of said Hoko River, from its mouth up to the aforesaid spawning grounds of the fish, has been a usual and accustomed fishing ground

for the Indians of the Makah Tribe, where said Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear, at various, usual and accustomed stations well known to the defendants; that both the Hoko River and the land and territory constituting the Makah Indian Reservation, reserved from the lands and territory ceded by said treaty by the Government of the United States, are in the northwest portion of Clallam County, Washington.

XIII.

That by reason of the reservation of the usual and customary fishing rights and privileges in and along the Hoko River as hereinbefore described in this bill of complaint, and by reason of the governmental guarantee that such rights would be secured to the members of the Makah Indian Tribe, said plaintiffs herein and the members of the Makah Tribe of Indians, and all of them, continuously since said treaty was made and until stopped by the defendants as hereinafter set forth, took fish from the Hoko River with seines, set nets and dip nets, and any and all other Indian fishing gear but were and are prevented from so doing by the wrongful acts of the defendants hereinafter described, although they still claim the right and privilege and attempted so to do; that the fishing [5] rights as claimed and exercised with which the defendants are unlawfully interfered as hereinafter set forth, were a portion of those fishing rights and privileges

guaranteed by the aforesaid treaty with the Makah, and were prior in point of time and interest to the alleged fishing rights of any white men or company or corporation whatsoever, or the State of Washington; that during all times until the year 1933, or immediately prior to first of said year, the plaintiffs herein and all of the members of the Makah Tribe of Indians for and on behalf of whom this action is brought, the posterity of the members of the Makah Tribe of Indians at the date the aforesaid treaty with the Makahs were made and concluded, their forbears and predecessors, were not interfered with or molested in the exercise of their fishing rights and privileges in and upon the Hoko River, and that until 1933, or immediately prior thereto, the State of Washington and its duly authorized agents and employees acquiesced and recognized the fishing rights as exercised and herein claimed.

XIV

That at all times since about the first of the year 1933, the defendants, their agents, assistants and employees, have interfered with and intentionally deprived the Tribe of Makah Indians, and the individual plaintiffs herein, of their rights and privileges of taking fish from their usual and accustomed place of fishing in the Hoko River and have intentionally prevented any fishing in any part of the Hoko River, by threatening to arrest and confiscate the fishing gear and equipment of any members of

said tribe fishing in or upon their aforesaid accustomed and usual fishing grounds and stations in the Hoko River, and the defendants will, unless enjoined and restrained by this Court, arrest any and all members of the Makah Tribe of Indians fishing in the Hoko River or any part thereof, and will also confiscate all their fishing gear and equipment; [6] that the Makah Tribe of Indians is now and from time immemorial has been dependent to a very substantial degree upon fishing for food and livelihood, and that circumstance was recognized by the representative of the United States Government when the aforesaid treaty with the Makah Tribe of Indians was made; that the Hoko River is and since time immemorial has been an important and valuable fishing place and that to deprive them of their rights to fish in said river irreparably damages the plaintiffs and the members of the plaintiff Indian Tribe in an amount which cannot be determined and materially impairs their principal source of food and livelihood.

XV.

That the value of the right in controversy exceeds for each of the above-named plaintiffs, exclusive of interest and costs, the sum of \$3,000.00.

XVI.

That neither the plaintiffs nor any of the members of the Makah Tribe of Indians nor any of their predecessors in interest, have at any time sold, assigned, transferred or conveyed his or their rights

or privileges nor any part thereof, in and to the fishing at and in the Hoko River, or any part thereof, to the defendants or to anyone whomsoever, nor have the plaintiffs herein or any of them, or any of the members of the said Makah Tribe of Indians in particular, abandoned said fishing place or places, or his or the rights of the individual plaintiffs and the other members of the Makah Tribe of Indians to fish therein, nor has the United States of America ever in any manner limited or disposed of the fishing rights of the Makah Tribe of Indians.

XVII.

That all of the acts, claims and pretenses, threats and arrests made by the defendants, their officers, agents, assistants and employees, are contrary to law and equity and good conscience [7] and tend to the manifest damage and oppression of the Makah Tribe of Indians, and of the plaintiffs herein named, and that the said defendants and each of them will continue, unless prevented by this Court, to deprive the said Tribe and plaintiffs herein, of their ancient, usual and accustomed fishing rights claimed under the aforesaid treaty between the United States of America and the Makah Tribe of Indians.

XVIII.

That the plaintiffs have no speedy or adequate remedy at law and can have no adequate remedy in equity except in this Court having jurisdiction thereof, that the defendants, and each and all of

them, their officers, agents and employees will, by arrests and imprisonment and confiscation of property, entirely prevent the plaintiffs herein and the Makah Indians from operating their seines, set nets, dip nets and other fishing gear unless they and each of them be enjoined by an injunction issued by this Court restraining and prohibiting said defendants and each of them from in any manner whatsoever interfering with the fishing operations and rights of the said Makah Indians in the Hoko River.

Wherefore, the plaintiffs, and each of them, pray for a decree of this Court as follows:

(1) Establishing that the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Tribe of Makah Indians, to which their rights and privileges of fishing were reserved by the treaty with the Makah made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

(2) Establishing the rights and privileges of these plaintiffs, and each of them and of all of the members of the Makah Tribe of [8] Indians to fish in their above-described usual fishing place by reason of their priority in time and interest and by reason of their treaty rights and privileges.

(3) Permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner

whatsoever interfering with or depriving the plaintiffs herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described.

The plaintiffs further pray that this Honorable Court, after due notice to the defendants, and each of them, issue its preliminary injunction restraining and enjoining the defendants and each of them, together with their agents, assistants, deputies and all persons acting by or under their control, or by, through or under the authority or direction of said defendants, or any of them, from in any manner interfering with the plaintiffs herein, or any of the members of the Makah Tribe of Indians while fishing upon the fishing grounds described and set forth in this bill of complaint, and from interfering with or preventing the plaintiffs herein or any of the members of the Makah Tribe of Indians, from selling their fish caught and taken upon the fishing grounds described in this bill of complaint, until the further order of the Court; and that this Court issue its order directed to the said defendants and each of them requiring them to show cause, if any they have, on a date certain and at a place to be fixed by this Court, why such preliminary injunction should not be issued and should not be continued in full force and effect during the pendency of this action.

The plaintiffs further pray that they may have such other and [9] further and different relief as the nature of this cause may require and as to this

Honorable Court may seem just and equitable and that they have and recover their costs and disbursements herein.

VANDERVEER, BASSETT &
GEISNESS,
Attorneys for Plaintiffs.

United States of America,
Western District of Washington,
Northern Division—ss.

We, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, and each of us, being first severally duly sworn, depose and say: That we are each plaintiffs in the above entitled suit and that the facts set forth in the foregoing Bill of Complaint are true as we and each of us verily believe; that this verification is made on behalf of each of us and all of the other plaintiffs herein, and of all of the Indians, members of the Makah Indian Tribe; that we are all members of the Council of the Makah Indian Tribe, and that we are authorized to and to make this verification for and on behalf of the said Makah Indian Tribe, a corporation.

(Seal)

CHARLES E. PETERSON,
PAUL PARKER,
ARTHUR CLAPLANHOO,
JERRY McCARTY,
HAROLD IDES.

Subscribed and sworn to before me this 24th day of September, 1940.

T. F. TRUMBULL,
Notary Public in and for the State of Washington,
residing at Port Angeles. [10]

EXHIBIT A

Treaty with the Makah, 1855

Jan. 31, 1855

12 Stat., p. 939

Proclamation, Apr. 18, 1859

Ratified Mar. 8, 1859

Articles of Agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah Tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flat-tery, on behalf of the said tribe and duly authorized by the same.

Article I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence run-

ning westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately *deded* to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

Article II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning, which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through said reservation, the Indians being compensated for any damage thereby done by them. It is, however, understood

that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Article III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Article V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty-thousand dollars, in [11] the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred

dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefits of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable places within said Territory as he

may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

Article VIII. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

Article IX. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens thereof, and should anyone or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations

on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

Article X. The above tribe is desirous to exclude, from its reservation the use of ardent spirits, and to prevent its people from [12] drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter, and farmer for the like term to instruct the Indians in their respective occupations. Provided, however, that it should be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place.

And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

Article XII. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

Article XIII. The said tribe finally agrees not to trade at Vancouver Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

Article XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Sep. 30, 1940. Millard P. Thomas, Clerk. By Elmo Bell, Deputy. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES E. PETERSON,
PAUL PARKER, ARTHUR CLAPLANHOO,
JERRY McCARTY AND HAROLD IDES.

United States of America

Western District of Washington

Northern Division—ss.

Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, being first severally duly sworn each for himself, deposes and says: The affiants named in the above entitled action are the governing body of the Makah Indian Tribe and constitute the Makah Tribal Council.

The Makah Indian Tribe is a Federal corporation chartered under the laws of the United States and comprises the members of the Makah Tribe of Indians. The above entitled action is brought by said corporation and its tribal council for and on behalf of all the members of the tribe and on behalf of all Makah Indians and it is also brought by the individual plaintiffs in their individual capacity in their own behalf and on behalf of the other members of said tribe. The individual plaintiffs, and all of the members of said tribe are citizens of the United States.

The defendants are officials of the Department of Game and Game Fish of the State of Washington and of the Department of Fisheries of the State of Washington. [14]

Under a treaty made January 31, 1855, between the United States of America and the Makah Tribe

of Indians, the members of said tribe are guaranteed and secured the right and privilege of taking fish at all of their usual and accustomed fishing grounds and stations. Said treaty is still in full force and effect.

The Hoko River, from its mouth up to the spawning ground of the fish in said river in Clallam County, Washington, is, and from time immemorial and from a time long prior to the date of the aforesaid treaty has been a usual and accustomed fishing ground for the Indians of the Makah Tribe, where the Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear at accustomed stations well established and known to the defendants, and each of them, and all of said Hoko River is within a few miles of the Makah Indian Reservation.

On January 30, 1855, in the proceedings leading up to the above mentioned treaty, Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing.

The defendants threaten to and will, unless restrained, arrest and imprison any Makah Indian fishing in said Hoko River with fishing gear used therein by the Makahs since time immemorial.

The Makah Indians are, and from time immemorial have been, dependent to a very substantial degree upon fishing for food and [15] livelihood and during all of those times the Hoko River has been and still is, an important and valuable fishing place and that deprivation of their rights to fish in said river irreparably damages said Indians in an amount which cannot be determined and materially impairs their principal source of food and livelihood.

The rights of the Makah Indians under said treaty have never been transferred, abandoned or in any wise modified but have been exercised by said Indians continuously from prior to the treaty until the defendants prevented the exercise of said rights as aforesaid.

All of the facts stated in this affidavit are more fully set forth, together with additional facts, in the bill of complaint in the above entitled cause and said bill of complaint, together with its attached Exhibit A, is hereby referred to, incorporated into this affidavit by reference, and the allegations therein contained are hereby adopted as the statements of affiants in this affidavit under oath.

[Seal]

CHARLES E. PETERSON

PAUL PARKER

ARTHUR CLAPLANHOO

JERRY McCARTY

HAROLD IDES

Subscribed and sworn to before me this 24th day of September, 1940.

T. F. TRUMBULL

Notary Public in and for the State of Washington,
residing in Seattle.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Oct. 1 1940. Millard P. Thomas, Clerk. By Elmo Bell, Deputy. [16]

[Title of District Court and Cause.]

SPECIAL APPEARANCE
MOTION TO DISMISS

Come now the defendants in the above entitled cause by Smith Troy, Attorney General, and T. H. Little Assistant Attorney General of the State of Washington, and appearing specially and for the sole purpose of this motion respectfully ask that the service of and the order to show cause issued herein and directed to said defendants be vacated and quashed, and that this cause be dismissed for want of jurisdiction over the defendants or either of them or of the subject matter of the action.

Dated at Olympia, Washington, this 3d day of October, 1940.

SMITH TROY

Attorney General

T. H. LITTLE

Assistant Attorney General

For Defendants, appearing
specially.

Service accepted and receipt of copy acknowledged this 3rd day of October, 1940.

VANDERVEER, BASSETT & GEISNESS

Attorneys for Plaintiffs.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Oct. 10, 1940. Millard P. Thomas, Clerk. By R. Elias Deputy. [19]

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This matter came on regularly for hearing on the 14th day of October, 1940, and, after continuance, on the 21st day of October, 1940, before the undersigned Court, upon the application of the plaintiffs for a preliminary injunction and upon the defendants' special appearance and motion to dismiss, the plaintiffs appearing by their attorney, John Geisness of the law firm of Vanderveer, Bassett & Geisness, and the defendants appearing by their attorneys, Smith Troy, Attorney General, and T. H. Little and Harry L. Parr, Assistant Attorneys General of the State of Washington, and oral arguments having been made, written briefs having been submitted on behalf of the respective parties, and

It appearing to the Court from the bill of complaint and the affidavits of the plaintiffs, no affidavits having been submitted by the defendants, that the defendants, B. F. McCauly, Director of the

Department of Game and Game Fish of the State of Washington, B. M. Brennan, Director of the Department of Fisheries of the State of Washington, E. M. Benn, an Inspector and Game Protector in the Department of [20] Fisheries and Department of Game and Game Fish of the State of Washington, and Guy Burnham, Game Protector in the Department of Game and Game Fish of the State of Washington, their officers, agents and employees, threaten to and will, unless enjoined by this Court, interfere with and molest the individual plaintiffs and other members of the Makah Indian Tribe in fishing or exercising their fishing rights at their usual and accustomed grounds and stations on and in the Hoko River from its mouth to the spawning grounds on said River, and the Court being fully advised in the premises;

It is hereby ordered that the defendants' special appearance and motion to dismiss be and is hereby overruled and denied.

It is further ordered that the said defendants, B. F. McCauly, B. M. Grennan, T. M. Benn and Guy Burnham, their officers, agents and employees be and they, and each of them, are hereby restrained and enjoined from in any manner interfering with or molesting the plaintiffs or other members of the Makah Indian tribe in the exercise of their fishing rights at their usual and accustomed grounds and stations on and at the whole of the Hoko River in Clallam County, Washington, from its mouth to the spawning grounds thereon; that the

said individual defendants, and each of them, are further restrained and enjoined from arresting, detaining or restraining said Indians, or in any other manner preventing them from fishing at their usual and accustomed fishing grounds as aforesaid.

This restraining order shall become effective upon the filing by the plaintiffs of a satisfactory bond in the sum of \$500.00 conditioned to pay all damages and costs which may accrue by reason of this preliminary injunction, and copies [21] of this preliminary injunction shall be forthwith served upon the defendants, and each of them.

Dated at Seattle, Washington, this 21st day of October, 1940.

JOHN C. BOWEN,
Judge.

Approved as to form:

HARRY L. PARR,
Assistant Attorney General,
for Defendants.

Presented by:

JOHN GEISNESS,
Attorney for Plaintiffs.

Service accepted of copies of preliminary injunction entered on the 21 day of October, 1940, by the above entitled Court on behalf of the defendants,

B. F. McCauly, B. M. Brennan, E. M. Benn and
Guy Burnham.

SMITH TROY,
Atty. General,
HARRY L. PARR,
Attorney for Defendants.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Oct. 21, 1940. Millard P. Thomas, Clerk.
By R. Elias, Deputy. [22]

[Title of District Court and Cause.]

ANSWER.

Come now the defendants and for answer to the
complaint herein admit, allege and deny as follows:

I.

Deny each and every allegation and the whole
thereof of paragraphs I to V inclusive of plaintiffs'
complaint.

II.

Defendants admit paragraphs VI to X inclusive
and paragraph XV of plaintiff's complaint.

III.

In answer to paragraph X of the complaint these
defendants admit the making of the treaty, Exhibit
1, but otherwise deny each, every and all of the
allegations of paragraph X of the plaintiffs' com-
plaint.

IV.

Defendants deny each and every allegation and the whole thereof of paragraph XI of plaintiffs' complaint. [23]

V.

These defendants deny each and every allegation and the whole thereof of paragraphs XII and XIII of plaintiffs' complaint.

VI.

These defendants deny each and every allegation and the whole thereof of paragraph XIV of the complaint.

VII.

Defendants deny each and every allegation and the whole thereof of paragraphs XVI, XVII and XVIII of the plaintiffs' complaint.

For a Further Answer These Answering Defendants Allege and Show the Following:

I.

That the above entitled court lacks jurisdiction over the subject matter of the said complaint.

II.

That said complaint fails to state a cause of action or claim upon which relief can be granted.

III.

That this cause of action is essentially a suit against the State of Washington and that the four defendants named are not the real parties in inter-

est; that they are all state officers and that their actions are in pursuance of a state statute and that the defendants and each of them are not the real parties in interest, but the State of Washington is the real party in interest.

IV.

That the plaintiffs are wards of the United States government and have no capacity to sue save and except as wards of the government of the United States and through and by the United [24] States attorneys for the Western District of Washington.

Wherefore, defendants pray that this cause may be dismissed and that defendants have their costs and disbursements herein.

SMITH TROY,

Attorney General,

T. H. LITTLE,

Assistant Attorney General,

HARRY L. PARR,

Assistant Attorney General,

Attorneys for Defendants.

State of Washington,
County of King—ss.

B. M. Brennan, being first duly sworn, on oath says: That he has read the above and foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification not only on behalf of himself but on behalf of the other defendants, and that he is authorized so to do.

B. M. BRENNAN.

Subscribed and sworn to before me this 24 day of October, A.D. 1940.

(Seal) GRACE C. BREWER,
Notary Public in and for the State of Washington,
residing at Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 24, 1940. Millard P. Thomas, Clerk. By R. Elias, Deputy. [25]

In the United States District Court for the Western District of Washington, Northern Division.

No. 268

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTY and HAROLD IDES, individually and as members of the council of the Makah Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,

Defendants.

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR JUDGMENT ON THE PLEADINGS.

The defendants move the court as follows:

I.

To dismiss the action on the ground that the court lacks jurisdiction to grant the relief prayed for under Section 266 of the Judicial Code (28 U. S. C. A., sec. 380).

This motion is made under Rule 12 (b), Rules of Civil Procedure.

II.

In the event the foregoing motion to dismiss is denied, defendants move for Judgment on the Pleadings on the ground that the complaint fails to state a claim upon which relief can be granted.

This motion is made under Rule 12 (c), Rules of Civil Procedure.

SMITH TROY,

Attorney General, State of
Wash.,

T. H. LITTLE,

Asst. Attorney General,
State of Washington.

Address: Temple of Justice,
Olympia, Washington.

Attorneys for Defendants.

Service of copy acknowledged this day
of, 1941.

Attorneys for Plaintiffs.

Copy received Feb. 27, 1941.

VANDERVEER, BASSETT &
GEISNESS,

Attorneys for

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 27, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [26]

[Title of District Court and Cause.]

STIPULATION AGREEMENT.

It Is Hereby Stipulated and Agreed by and between the parties hereto, by and through their respective counsel, that the motion for judgment on the pleadings in the cause herein may be determined by a court of three judges, organized pursuant to Section 266 of the Judicial Code (title 28 U. S. C. A. Section 280) and if such statutory court finds that it lacks jurisdiction the said motion shall be determined and disposed of by a single district judge without a further hearing, unless otherwise ordered by the Court:

Dated this 15th day of April, 1941.

VANDERVEER, BASSETT &
GEISNESS,

Attorneys for Plaintiffs,
SMITH TROY,

Attorney General,
By T. H. LITTLE,
Assistant Attorney General,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District Court Western District of Washington, Northern Division, Apr. 15, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [30]

[Title of District Court and Cause.]

MEMORANDUM DECISION.

Vanderveer, Bassett & Geisness, Seattle, Washington, Attorneys for Plaintiffs.

Hon. Smith Troy, Attorney General of the State of Washington, Olympia, Washington.

Hon. T. H. Little, Asst. Attorney General of the State of Wash., Olympia, Washington. Attorneys for Defendants.

Bowen, District Judge:

Motion for judgment on the pleadings which consist of the complaint and answer.

The complaint alleges among other things that plaintiff Indians by the Makah Indian Treaty of 1859 were secured in their right to fish at their usual and accustomed grounds and stations including the Hoko River in the Olympic Peninsula of the State of Washington, but that the defendant state officers since 1933 have interfered with and prevented such rights by threatening to arrest plaintiff Indians and to confiscate their fishing gear, and that the defendants will, unless enjoined by this court, continue to so prevent plaintiffs from enjoying such fishing rights in the future, all in violation of such treaty. [32]

By their answer defendants allege (1) that this court is without jurisdiction of the subject matter; (2) that the defendants are state officers, that their acts complained of are in pursuance of a state

statute, that they are not the real parties in interest but that the real party in interest is the State of Washington (which it is argued by reason of the 11th Amendment cannot be sued in this action); (3) that plaintiff Indians are wards of the United States Government and have no capacity to sue except as such wards by the United States Attorney; and (4) that plaintiffs' complaint fails to state a cause of action upon which relief can be granted (under which issue defendants argue and plaintiffs deny that the Makah Indian Treaty is invalid as against the asserted authority of defendant state officers to enforce the state fishing laws, which are nowhere specially set up in the pleadings).

1. This court has jurisdiction of the subject matter of this action because it involves plaintiffs' asserted rights under an Indian treaty with the United States of the alleged value of more than \$3000.00 exclusive of interest and costs, plaintiffs' allegations of such jurisdictional amount being admitted by defendants' answer.

2. This is an action against state officers for relief against their acts alleged to be unlawful because in conflict with plaintiffs' fishing rights under the Makah Indian Treaty with the United States. "The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh Amendment" to the U. S. Constitution. *Sampson vs. Brennan*, Cause No. 74 of this Court, Memorandum Decision filed August 3, 1939. See also *Pennoyer vs. McConnaughy*,

140 U. S. 1, 10; *Ex parte Young*, 209 U. S. 123; *Ex parte New York*, 256 U. S. 490, 500. [33]

3. "Plaintiff Indians being citizens of the United States (8 U. S. C. A., Sec. 3) may as other citizens employ counsel of their own choice. They may also in a federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States." *Sampson v. Brennan*, *supra*. See also *Deere v. New York*, 22 F. (2d) 851; *Y-Ta-Tah-Wah v. Rebeck*, 105 Fed. 257, 259; *Lane v. Santa Rosa*, 249 U. S. 110, 113-114.

4. The final issue presented is whether the complaint states a cause of action upon which the requested relief can be granted. In the briefs and at the oral argument counsel have treated and the court will likewise treat this issue as raising the question of the validity of Article IV of the Makah Treaty providing that:

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens."

Defendants emphasize that although the right to fish (the only right here in question) is by the

treaty "*further secured*"* to the Indians, such right is so secured only "*in common with all citizens*" of the United States, and therefrom defendants argue that just as are other citizens' fishing rights, so are such rights of the Indians, subject to all reasonable police power legislation and regulation by the state for the preservation and protection of fish and game, that such police power reserved to the people and exercised for them by the state is paramount to all conflicting treaty provisions, that the state fish and game laws are police measures which apply not only to the Indians but alike to all citizens, Indians and others, and that this conflicting [34] treaty provision securing to the Indians their fishing rights must yield to such state police laws.

But does not that argument assume that the Treaty *granted* instead of "*further secured*" to the Indians their fishing rights? Obviously such an assumption is contrary to the fact indisputably established by history and common knowledge. This nation by conquest and treaty acquired the land from the Indians, but before and after every conquest and conflict and after many a treaty the Indians asserted and enjoyed their ancient right to hunt and fish. That ancient right, of all the Indian rights of remotest antiquity, has by this nation and the Indians been regarded as the most sacred right of the Indians and has seldom ever been ques-

*Italics throughout this Decision are by the Court.

tioned. It is believed that, before the Stevens treaties, of which the Makah Treaty is one, the Indians' right to fish in the domain now included in this state never was questioned by public authority or at all, and in this instance it is a most notable fact that subsequent to this Treaty the right to fish "further secured" to the Indians by this Treaty was unfailingly recognized and respected by all until the year 1933, a continuous period of about 75 years.

This Court is of the opinion that as contended by plaintiffs the answer to this question as to the Treaty's validity turns upon the sounder theory that the Treaty *granted* nothing to the Indians, but that the Treaty in truth and in fact merely reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed. This conclusion is rendered inescapable by a fair consideration not only of Article IV, *supra*, but also of all the other provisions of the Treaty. Nowhere in the Treaty can be found a *conveyance* by the United States to the Indians of any property, except the money [35] consideration to be paid by the Government for the lands and rights in the Treaty conveyed by the Indians to the Government. In the Treaty the United States is the sole grantee and the Indians exclusively are the grantors of all the property covered by the Treaty, except that money consideration, and with that single exception the Treaty *conveyed* no property to the Indians. Upon consid-

eration of the conveyance by the Indians of their lands to the Government, the United States by Article IV, supra, solemnly recognized and guaranteed that "The right of taking fish * * * *at usual and accustomed grounds and station is further secured to said Indians * * **" (emphasis supplied). So it is readily seen the Treaty does not even purport to *grant* any fishing rights. It merely "*further secured*" to the Indians what fishing rights they already had, at their "usual and accustomed grounds and stations".

That conclusion is further fortified by the following statements of the Indian chiefs and head men and of Governor Stevens when they negotiated this Treaty in 1855:

"Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing." (Affidavit of Charles E. Peterson et al. filed October 1, 1940).

And so by stating the foregoing objects and purposes of the Treaty, the spokesmen for its High Contracting Parties construed it as a solemn declaration and guarantee reserving to the Indians for the Treaty's duration, which those spokesmen undoubtedly then thought would be for all [36] time to come, the sacred fishing rights of the Indians already and from time immemorial enjoyed by them. How then can it be said that the Treaty *granted* any Indian fishing rights? It did not. It merely *reserved* and guaranteed to the Indians those fishing rights which they always before had possessed and enjoyed.

That construction also leads to a denial of defendant's further contention that by the phrase "in common with all citizens of the United States" the treaty provision for the Indians' benefit was intended to be subject to future state police regulation of fish and game, because other citizens' fishing rights are subject to such police regulation. But it is far more probable that by that phrase the Indians merely indicated their willingness to share their pre-existing fishing rights with all citizens, and that the Indians were willing to continue to recognize other citizens' fishing rights then known to the Indians. There is no allegation or showing in this case that the Indians anticipated the possibility that in the future other citizens might have their fishing rights limited by the exercise of state police power or that other citizens' fishing rights as the Indians knew them when the Treaty was made

might in any way be changed. Nor is there allegation or proof here that the Indians knew of or appreciated the present or possible future existence of any state sovereignty which might attempt to limit the fishing rights of either Indians or other citizens. The only sovereignty, other than their own tribal authority, whose power to regulate fishing was understood by the Makah Indians, very likely was our national government, to them the "Great White Father", with whom they were then negotiating a treaty to reserve and further secure to them their fishing rights at their "usual and accustomed" places. [37]

This nation never acquired for its people by conquest, and did not by the Makah Treaty acquire, the pre-existing ancient Indian fishing rights on which the asserted police power could operate. The police power here invoked by defendants does not apply to subjects, such as Indian fishing rights, not possessed by the people, state or nation. The cases of *Kennedy v. Becker*, 241 U. S. 556, and *Ward v. Race Horse*, 163 U. S. 504, limiting or denying Indian treaty fishing rights, relied upon by defendants, are distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the Indians anticipated the future sovereign power to limit.

Those cases are distinguishable upon the further ground that the grant of citizenship to Indians by the Act of June 2, 1924 (8 U. S. C. A., Sec. 3), enacted subsequent to decision of those cases, defi-

nately withdrew the Indians' tribal and other property, such as fishing rights, from the operation of police power affecting the rights of other citizens. In effect, it was so held in *Mason v. Sams*, 5 F. (2d) 255 (D. C. Wash.), where Judge Cushman for the court at pages 257 and 258 said:

"These Indian plaintiffs have been, by the Act of June 2, 1924 (43 Stat. at Large 1923-1924, part 1, page 253, c. 233), made citizens of the United States, with this proviso:

" 'That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.'

"Under the rule favoring the Indians in the interpretation of treaties and laws affecting them, already alluded to, any fishing rights of plaintiffs under the treaty are preserved by this proviso."

This Makah Treaty should have applied to it in favor of the Indians the rule of *Nielsen v. Johnson*, 279 U. S. 47, 51-52, applicable to Indian and other treaties, that: [38]

"Treaties are to be liberally construed so as to effect the apparent intention of the parties. (Citing cases.) When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, (citing cases), and as the treaty-

making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. (Citing cases.) When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. (Citing cases.)”

And the Supreme Court has held that an Indian treaty should be liberally construed so as to give effect to the meaning attached to the treaty by the Indians themselves. So in *Seufert Brothers Company v. United States*, 249 U. S. 194, 198, quoting in part from *U. S. v. Winans*, 198 U. S. 371, the court said:

“We will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,’ and counterpoise the inequality ‘by the superior justice which looks only to the substance of the right without regard to technical rules.’ 119 U. S. 1; 175 U. S. 1.”

No exception is made of state police power in the rule above quoted from *Nielsen v. Johnson*,

supra, when the court said that “* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed (i. e., liberally) is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments”.

[39]

The decision of this court upon the motion for judgment on the pleadings is that judgment should be entered for plaintiffs in accordance with the prayer of their complaint.

An order may be settled upon notice or stipulation.

JOHN C. BOWEN

United States District Judge

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, May 1, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came regularly before this Court on Tuesday, the 15th day of April, 1941, upon the motion of defendants for judgment upon the pleadings, the plaintiffs appearing by Vanderveer, Bassett & Geisness and the defendants appear-

ing by Hon. Smith Troy, Attorney General of the State of Washington and T. H. Little, his Assistant; the Court heard oral argument made by John Geisness, of counsel for the plaintiffs, and T. H. Little, of counsel for the defendants, read and considered briefs submitted by both the plaintiffs and the defendants, and examined the records and files herein; it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause and evidence was adduced in support of the allegations in the Bill of Complaint, without objection from the defendants; and the Court having rendered a written opinion, it now makes the following

FINDINGS OF FACT

I.

That the Makah Indian Tribe is a federal corporation [41] chartered under the laws of the United States with headquarters at Neah Bay, Washington, which has completed its organization under said laws and is a recognized and existing Indian organization.

II.

That the governing body of the Makah Indian Tribe, a corporation, consisting of a council known as the Makah Tribal Council or Council of the Makah Indian Tribe, which said council consists of

five (5) members as follows, to-wit: Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides.

III.

That all of the members of said Makah Indian Tribe are Makah Indians, and that this action is brought by said corporation and its tribal council for and on behalf of all of the members of the said tribe and on behalf of all of the Makah Indians by virtue of the power and authority there invested by the constitution and the charter of the said tribe and the laws of the United States under which said corporation was organized and now exists.

IV.

That the individual plaintiffs, in their individual capacity, bring this action on their own behalf and also on behalf of all of the other members of the said Makah Tribe of Indians who are similarly affected by the action of the defendants hereinafter described.

V.

That all of the individual plaintiffs and all of the members of the said Makah Indian Tribe, for and on behalf of whom this suit is instituted, are citizens of the United States; that the Makah Indian Tribe, a corporation, consists of numerous Makah Indians who are duly enrolled and recognized members of said tribe. [42]

VI.

That the defendant B. F. McCauly is the director of the Department of Game and Game Fish in the State of Washington and is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

VII.

That the defendant B. M. Brennan is the director of the Department of Fisheries of the State of Washington and is now a resident of Seattle, King County, Washington, and within the Northern Division of the Western District of Washington and within the jurisdiction of this Court.

VIII.

That the defendant E. M. Benn is an inspector and game protector in the Department of Fisheries and Department of Game and Game Fish of the State of Washington, and is now a resident of Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

IX.

That the defendant Guy Burnham is a game protector in the Department of Game and Game Fish of the State of Washington, and is now a resident of Forks, Clallam County, Washington, within the Northern Division of the Western District of Washington, within the jurisdiction of this Court.

X.

That on the 31st day of January, 1855, Articles of Agreement and Convention were made and concluded at Neah Bay, in the Territory of Washington, between the United States of America, acting through its duly authorized agent and representative, and the Makah Tribe of Indians acting through its chiefs and head men and delegates of the several villages of said tribe, [43] thereunto duly authorized; that this treaty was ratified by the Senate of the United States March 8, 1859, and accepted and proclaimed by the President of the United States as the law of the land on April 18, 1859, which treaty reserved and secured to the members of the Makah Tribe of Indians, and to their posterity and successors in interest the right and privilege of taking fish at the usual and accustomed ground and stations; that at all times since it was originally made and concluded as aforesaid, said treaty has been and still is in full force and effect; that a true and correct copy of said treaty is attached to the bill of complaint, marked Exhibit "A" and incorporated therein by reference.

XI.

That the cause of action stated in said bill of complaint arises under the aforesaid treaty of the United States with the Makah Tribe of Indians. That this action involves the plaintiffs' asserted rights under the aforesaid Makah Indian treaty.

That from time immemorial, the Indians of the Makah Indian Tribes were accustomed to fish in

XII.

the Hoko River, from its mouth up to the spawning grounds of the fish in said river, in Clallam County, State of Washington, and that from time immemorial the whole of said Hoko River, from its mouth up to the aforesaid spawning grounds of the fish, has been a usual and accustomed fishing ground for the Indians of the Makah Tribe, where said Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear, at various, usual and accustomed stations well known to the defendants; that both the Hoko River and the land and territory constituting the Makah Indian Reservation, reserved from the lands and territory ceded by said treaty by the Government of the United States are in [44] the Northwest portion of Clallam County, Washington.

XIII.

That by reason of the reservation of the usual and customary fishing rights and privileges in and along the Hoko River, as described in said bill of complaint, and by reason of the governmental guarantee that such rights would be secured to the members of the Makah Indian Tribe, said plaintiffs herein and the members of the Makah Tribe of Indians, and all of them, continuously since said treaty was made and until stopped by the defendants as hereinafter set forth, took fish from the Hoko River with seines, set nets and dip nets, and any and all other Indian

fishing gear but were and are prevented from so doing by the wrongful acts of the defendants hereinafter described, although they still claim the right and privilege and attempted so to do; that the fishing rights as claimed and exercised with which the defendants are unlawfully interfering as hereinafter set forth, were a portion of those fishing rights and privileges guaranteed by the aforesaid treaty with the Makah, and were prior in point of time and interest to the alleged fishing rights of any white men or company or corporation whatsoever, or the State of Washington; that during all times until the year 1933, or immediately prior to first of said year, the plaintiffs herein and all of the members of the Makah Tribe of Indians for and on behalf of whom this action is brought, the posterity of the members of the Makah Tribe of Indians at the date aforesaid treaty with the Makahs was made and concluded, their forebears and predecessors, were not interfered with or molested in the exercise of their fishing rights and privileges as herein claimed, in and upon the Hoko River, by the State of Washington or its duly authorized agents and employees. [45]

XIV.

That at all times since about the first of the year 1933, the defendants, their agents, assistants and employees, have interfered with and intentionally deprived the Tribe of Makah Indians, and the individual plaintiffs herein, of their rights and privi-

leges of taking fish from their usual and accustomed place of fishing in the Hoko River and have intentionally prevented any fishing in any part of the Hoko River, by threatening to arrest and confiscate the fishing gear and equipment of any members of said Tribe fishing in or upon their aforesaid accustomed and usual fishing grounds and stations in the Hoko River, and the defendants will, unless enjoined and restrained by this Court, arrest any and all members of the Makah Tribe of Indians fishing in the Hoko River or any part thereof, and will also confiscate all their fishing gear and equipment; that the Makah Tribe of Indians is now and from time immemorial has been dependent to a very substantial degree upon fishing for food and livelihood, and that circumstance was recognized by the representatives of the United States Government when the aforesaid treaty with the Makah Tribe of Indians was made; that the Hoko River is and since time immemorial has been an important and valuable fishing place and that to deprive them of their right to fish in said river irreparably damages the plaintiffs and the members of the plaintiff Indian Tribe in an amount which cannot be accurately determined and materially impairs their principal source of food and livelihood.

XV.

That the value of the right in controversy exceeds for each of the above named plaintiffs, exclusive of interest and costs, the sum of \$3,000.00. [46]

XVI.

That neither the plaintiffs nor any of the members of the Makah Tribe of Indians nor any of their predecessors in interest, have at any time sold, assigned, transferred or conveyed his or their rights or privileges nor any part thereof, in and to the fishing at and in the Hoko River, or any part thereof, to the defendants or to anyone whomsoever, nor have the plaintiffs herein or any of them, or any of the members of the said Makah Tribe of Indians in particular, abandoned said fishing place or places, or his or the rights of the individual plaintiffs and the other members of the Makah Tribe of Indians to fish therein, nor has the United States of America ever in any manner limited or disposed of the fishing rights of the Makah Tribe of Indians.

XVII.

That all of the acts, claims and pretenses, threats and arrests made by the defendants, their officers, agents, assistants and employees, are contrary to law and equity and good conscience and tend to the manifest damage and oppression of the Makah Tribe of Indians, and of the plaintiffs herein named, and that the said defendants and each of them will continue, unless prevented by this Court, to deprive the said Tribe and plaintiffs herein, of their ancient, usual and accustomed fishing rights claimed under the aforesaid treaty between the United States of America and the Makah Tribe of Indians.

XVIII.

That the plaintiffs have no speedy or adequate remedy at law; that the defendants, and each and all of them, their officers, agents and employees will, by arrests and imprisonment and confiscation of property, entirely prevent the plaintiffs herein and the Makah Indians from fishing in their aforesaid usual and accustomed fishing place unless they and each of them [47] be enjoined by an injunction issued by this Court restraining and prohibiting said defendants and each of them from in any manner whatsoever interfering with the fishing operations and rights of the said Makah Indians in the Hoko River.

Done in Open Court this 3rd day of June, 1941.

JOHN C. BOWEN

Judge

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiffs have capacity to bring this action.

II.

That this case arises under a treaty of the United States and is not a suit against the State of Washington.

III.

That this court has jurisdiction of the subject matter of this action and of the parties thereto.

IV.

That the right and privilege of fishing in the entire Hoko River from its mouth up to the spawning grounds were reserved to the Makah Indian Tribe by the treaty between said Tribe and the United States Government made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

V.

That the individual plaintiffs and the other members [48] of the Makah Indian Tribe possess the right to fish in said usual and accustomed place under said treaty.

VI.

That the plaintiffs are entitled to a decree of this court permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner whatsoever interfering with the exercise by the plaintiffs herein or any of the members of the Makah Indian Tribe of their rights and privileges of fishing in their usual and accustomed place hereinabove described and from in any manner whatsoever interfering with or preventing fishing by the plaintiffs herein, or any of the members of the Makah Indian Tribe in said usual and accustomed fishing place and from in any manner interfering

with or preventing the plaintiffs herein or any of the members of the Makah Tribe of Indians from selling their fish caught and taken at said fishing place.

Done in Open Court this 3rd day of June, 1941.

JOHN C. BOWEN

Judge

Presented by:

JOHN GEISNESS

of Vanderveer, Bassett & Geisness,

Attorneys for Plaintiff

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun 3, 1941. Millard P. Thomas, Clerk. By J. M. A., Deputy. [49]

In the United States District Court
For the Western District of Washington,
Northern Division

No. 268

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTY and HAROLD IDES, individually and as members of the Council of the Makah Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,

Defendants.

DECREE

The above entitled cause came regularly before this Court on Tuesday, the 15th day of April, 1941, upon the motion of the defendants for judgment upon the pleadings, the plaintiffs appearing by Vanderveer, Bassett & Geisness, and the defendants appearing by Honorable Smith Troy, Attorney General of the State of Washington, and T. H. Little, his assistant; it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause, and evi-

dence was adduced in support of the allegations in the bill of complaint, without objections from the defendants; the Court having heard oral argument made by John Geisness, of counsel for the plaintiffs, and T. H. Little, of counsel for the defendants, read and considered briefs submitted by both the plaintiffs and defendants, and examined the records and files herein, and the Court having rendered a written opinion and made Findings of Fact and Conclusions of law, it is now

ORDERED, ADJUDGED AND DECREED [50]

I.

That the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Makah Indian Tribe, as to which their rights and privileges of fishing were reserved by the Treaty with the Makah made and concluded January 31, 1855, and proclaimed by the President of the United States April 18, 1859.

II.

That the individual plaintiffs and other members of the Makah Indian Tribe possess the right to fish in said usual and accustomed place under said Treaty.

III.

That the defendants, and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control,

or under the control of any of them, are permanently enjoined and restrained from in any manner whatsoever interfering with the exercise by the plaintiffs herein, or any of the members of the Makah Indian Tribe, of their rights and privileges of fishing in their usual and accustomed place hereinabove described, and from in any manner whatsoever interfering with or preventing fishing by the plaintiffs herein, or any of the members of the Makah Indian Tribe, in said usual and accustomed fishing place, and from in any manner whatsoever interfering with or preventing the plaintiffs herein, or any of the members of the Makah Indian Tribe, from selling their fish caught and taken at said fishing place.

Done in open court this 3rd day of June, 1941.

JOHN C. BOWEN,

Judge.

Presented by:

JOHN GEISNESS,

Of Counsel for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 3, 1941. Millard P. Thomas, Clerk. J. M. A. Deputy. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that B. T. McCauley, Director of Game of the State of Washington; B. M. Brennan, Director of Fisheries of the State of Washington; E. M. Benn, Inspector of the Department of Fisheries of the State of Washington; and Guy Burnham, Game Protector of the State of Washington, defendants herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final decree entered in this action on June 3, 1941.

Dated this 20th day of August, 1941.

SMITH TROY,

Attorney General,

State of Washington.

T. H. LITTLE,

Assistant Attorney General,

State of Washington

Attorneys for Defendants and
Appellants.

Address: Temple of Justice,
Olympia, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 23, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [52]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents:

That the undersigned, B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington, in the above entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the above entitled Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe, in the penal sum of Two Hundred Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, [53] their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed this 28th day of August, 1941.

Whereas, on the 3rd day of June, 1941, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named obligees and against the above named principals;

And whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the United States Circuit Court of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, therefore, the condition of the above obligation is such, that if the said appellants will pay all costs that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

[Seal]

B. T. McCAULEY

[Seal]

B. M. BRENNAN

[Seal]

E. M. BENN

[Seal]

GUY BURNHAM

FIREMEN'S FUND INDEMNITY COMPANY

By M. F. MAURY,
Attorney-in-fact.

[Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 28, 1941. Millard P. Thomas, Clerk. By C. R. Fitzgerald, Deputy. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD ON
APPEAL.

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 56, inclusive, is a full, true and complete copy of so much of the record, papers and **other** proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, Washington, and that the same constitute the record on appeal herein from the Decree of the United States District Court for the Western District of Washington granting the relief prayed for in the complaint to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [57]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 154 folios at 05c (copies furnished)	\$ 7.70
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record50
<hr/>	
Total	\$13.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$13.20, has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of September, 1941.

[Seal] MILLARD P. THOMAS,
Clerk, United States District Court for the Western District of Washington.

By TRUMMAN EGGER,
Deputy. [58]

[Endorsed]: No. 9924. United States Circuit Court of Appeals for the Ninth Circuit. B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington, Appellants, vs. Makah Indian

Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 27, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9924

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTHY and HAROLD IDES, individually and as members of the Council of the Makah Indian Tribe,

Plaintiffs and Appellees.

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,
Defendants and Appellants.

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

The following is a statement of points on which the appellants intend to rely on their appeal to the above entitled court from that certain decree entered by the United States District Court for the Western District of Washington, Northern Division, granting a permanent injunction, to wit:

I.

The District Court erred in denying defendants' motion to dismiss for want of jurisdiction of the defendants or of the subject matter of the action, in that

(a) The action in equity is one against public officers of the State of Washington as such, hence in truth and in fact an action against the State of Washington;

(b) This is an action against the state by Indians, who by Acts of Congress have been made citizens thereof, hence the United States District Court has no jurisdiction;

(c) Plaintiffs although citizens of the State of Washington are suing on behalf of the tribe, as wards of the Federal Government and as such have no legal capacity to sue due to their disability, and any action in their behalf must be brought by the United States Government, through the United States District Attorney.

II.

The District Court erred in issuing a preliminary injunction contrary to law.

III.

The District Court erred in denying defendants' motion for judgment on the pleadings as contrary to law. The court's action is repugnant to the following established principles which are involved herein:

(a) A state's police power is one of the highest attributes of sovereignty, and that power has never been delegated by the several states to the Federal Government.

(b) The police power can neither be abdicated nor bargained away, and is inalienable even by express grant.

(c) Upon admission into the Union, a state becomes possessed of all the rights and powers co-equal with her sister jurisdictions.

(d) The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. The Stevens Treaty of 1855 did not curtail or abridge the police power of the future State of Washington, and upon its admission into the Union, the state became endowed with full police powers.

(e) The protection of fish and the regulation of fishing is for the common benefit of the people, and legislation directed to that end is a valid and proper exercise of the police power. Over fish found within its waters, and over wild game, the state has supreme control.

(f) Fish and game laws of the State of Washington are regulatory measures and constitute a lawful exercise of the state's police power. They have for their purpose the necessary preservation of the state's commercial and game fisheries, and meet all the requirements that the lawful exercise of police power must be reasonable, nondiscriminatory and non-arbitrary.

(g) The fishing places in question are outside the boundaries of the Makah Reservation

and within the sole jurisdiction of the State of Washington.

(h) The Makah Indian Treaty secured to the members of the federated Makah Tribe a vested easement right of ingress to and egress from their "usual and accustomed grounds and stations" outside the reservation, there to fish "in common with all citizens of the United States"; subject to any valid exercise of the right by the sovereign which is operative on all alike for the best interests of the state's aquatic resources.

(i) Indian treaties are to be given a liberal construction, but must be considered in the light of current and economic conditions prevailing in the development and conservation of our natural resources, having in mind the welfare of all the people.

(j) The Indian, by Act of Congress in 1924, has been made a citizen of the United States and of the state in which he resides. As such, he is entitled to all the rights, privileges and immunities accorded other citizens of the state, and to the equal protection of its laws, and is also subject to its laws.

(k) Conservation of our fast diminishing natural resources is one of the chief concerns of organized government today. In the discharge of this important responsibility for and on behalf of its people, the state of Washington is acting as much in the interest of the Indian

citizen as any other, and its obligation toward him is just as great, for the Indian is now an integral part of its citizenry.

IV.

The District Court erred in entering Finding of Fact XVIII, in substance that the defendants will entirely prevent the plaintiffs from fishing unless the injunction became operative.

V.

The District Court erred in entering Conclusion of Law I, that the plaintiffs have capacity to bring this action.

VI.

The District Court erred in entering Conclusion of Law II, that this case is not a suit against the State of Washington.

VII.

The District Court erred in entering Conclusion of Law III, that the court had jurisdiction of the subject matter of the action and of the parties hereto.

VIII.

The District Court erred in entering Conclusion of Law IV, that the rights of fishing in the entire Hoko River from its mouth to the spawning ground were reserved to the Makah Indian Tribe by the treaty of 1855.

IX.

The District Court erred in entering its decree holding that the Makah Indians' right to fish at points off the reservation is not subject to state regulation, and permanently restraining the State law enforcement officers from interfering with plaintiffs' fishing operations at such places.

The appellants hereby designate the following parts of the record as necessary for the consideration of the above and foregoing points on which they intend to rely on appeal:

- (1) Plaintiffs' bill of complaint, with attached affidavit.
- (2) Defendants' special appearance and motion to dismiss.
- (3) Preliminary injunction entered by the District Court.
- (4) Defendants' motion to dismiss or in the alternative for judgment on the pleadings.
- (5) Stipulation that motion for judgment on the pleadings may be disposed of by a single District Judge in the event the statutory court finds it lacks jurisdiction.
- (6) Memorandum decision by the District Court.
- (7) Findings of Fact and Conclusions of Law entered by the District Court.
- (8) Decree entered by the District Court granting permanent injunction.
- (9) Notice of Appeal.
- (10) Cost Bond.

Dated this 17th day of September, 1941.

SMITH TROY,

Attorney General.

T. H. LITTLE,

Assistant Attorney General,

Attorneys for Appellants.

[Endorsed]: Filed Sept. 27, 1941. Paul P.
O'Brien, Clerk.

In the
United States Circuit Court
of Appeals
for the
Ninth Circuit

No. 9924

B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington,
Appellants,
vs.

Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
United STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

FILED

DEC 20 1941

SMITH TROY,

Attorney General of the State of Washington,

PAUL P. O'BRIEN,

T. H. LITTLE,

CLERK

Assistant Attorney General of the State of Washington,

Attorneys for Appellants.

In the

United States Circuit Court of Appeals

for the

Ninth Circuit

No. 9924

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

Appellants,

vs.

MAKAH INDIAN TRIBE, a corporation, CHARLES E. PETERSON, PAUL PARKER, ARTHUR CLAPLANHOO, JERRY MCCARTHY and HAROLD IDES, individually and members of the Council of the Makah Indian Tribe,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
United STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

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In the
**United States Circuit Court
of Appeals**
for the
Ninth Circuit

No. 9924

B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington,

Appellants,

vs.

Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
United STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

STATEMENT OF PLEADINGS AND BASIS OF
JURISDICTION

The Bill of Complaint was filed in the District Court of the United States for the Western District of Washington by the Makah Indian Tribe, a corporation, and

certain Makah Indians individually and as members of the Council of the Makah Indian Tribe, against B. T. McCauley, Director of Game of the State of Washington; B. M. Brennan, Director of Fisheries of the State of Washington; E. M. Benn, Inspector of the Department of Fisheries of the State of Washington; and Guy Burnham, Game Protector of the State of Washington, praying for a decree of the court as follows:

“(1) Establishing that the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Tribe of Makah Indians, to which their rights and privileges of fishing were reserved by the treaty with the Makah made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

“(2) Establishing the rights and privileges of these plaintiffs, and each of them and of all of the members of the Makah Tribe of (8) Indians to fish in their above-described usual fishing place by reason of their priority in time and interest and by reason of their treaty rights and privileges.

“(3) Permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner whatsoever interfering with or depriving the plaintiffs herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described.”

Defendants filed a Special Appearance and Motion to Dismiss for want of jurisdiction over the defendants, or of the subject matter of the action.

The District Court overruled defendants' objection to the jurisdiction of the court and entered a preliminary injunction restraining the state officers from enforcing the state fish and game laws on the Hoko River.

Subsequently, defendants filed a Motion to Dismiss under Rule 12 (b), Rules of Civil Procedure, contending that a District Court lacks jurisdiction to grant the relief prayed for, namely, an interlocutory and permanent injunction, under Section 266 of the Judicial Code (28 U. S. C. A., sec. 380), or in the alternative for Judgment on the Pleadings under Rule 12 (c), Rules of Civil Procedure. The District Judge convened a three-judge court which determined the case was not a proper one for a statutory court in that the pleadings did not bring forward nor present the question of constitutionality of a statute of the State of Washington. No appeal was taken from the order entered by such court.

The parties stipulated that the motion for Judgment on the Pleadings might be determined by a single district judge if such statutory court found that it lacked jurisdiction, and the appeal herein embraces (A) defendants' unsuccessful challenge to the jurisdiction of the District Court, and (B) the District Court's denial of defendants' motion for Judgment on the Pleadings.

While the jurisdiction of the District Court in this suit is challenged by the state, if this appellate tribunal sustains the lower court on this point, jurisdiction will rest on the provisions of Title 28, U. S. C. A., sec. 41 (1), vesting the District Court with jurisdiction over questions "arising under the Constitution and laws of the United States or treaties made under their authority."

STATEMENT OF CASE

The Makah Indian Tribe and the individual members thereof brought this injunction suit to establish that the Hoko River in Clallam County, Washington, located some twelve or fifteen miles from the Makah Reservation, is a "usual and accustomed fishing ground" of the Makah Tribe, and that under the Stevens Treaty of January 31, 1855 (12 Stat. 939) the members of the tribe are entitled to fish without interference in any manner whatsoever by the State of Washington, acting through its agents, the only medium by which its authority can be exercised.

Defendants by their motion for Judgment on the Pleadings, which is tantamount to a demurrer, for the purpose of raising the issue of law herein presented, admit that

(1) The plaintiff, Makah Indian Tribe, is a corporation and that it is a confederated tribe. That the individual plaintiffs are members of the Makah Tribal Council.

(2) That the defendants are law enforcement officials of the State of Washington. That B. T. McCauley is the director of the Department of Game and Game Fish of the State of Washington; that B. M. Brennan is the director of the Department of Fisheries of the State of Washington; that E. M. Benn is a duly authorized and qualified inspector of the Department of Fisheries; and that Guy Burnham is a duly authorized and qualified game protector of the Department of Game and Game Fish of the State of Washington.

(3) That a treaty was entered into by the Makah Tribe of Indians and the United States of America on

January 31, 1855, at Neah Bay; that the treaty was proclaimed by the President of the United States as the law of the land on April 18, 1859, and that the treaty was ratified by the Senate of the United States on March 8, 1859.

(4) That by the terms of the Indian Treaty, there was reserved for the permanent use and occupation of the Makah Tribe the tract of land more particularly described in Articles I and II of the Makah Tribe (Exhibit A), popularly known as the Makah Indian Reservation.

(5) That the Hoko River, in Clallam County, located approximately 12 miles from the boundary of the Makah Indian Reservation, is a usual and accustomed fishing ground and station for the Makah Indians off the reservation, and that the Makah Indians take fish as a means of livelihood by various types of modern fishing gear as set forth in the complaint, namely: by use of seines, set nets, dip nets or other fishing gear.

Defendants admit the foregoing pertinent facts and contend as a matter of law that the treaty secured to the Makah Indians only an equality of fishing rights and privileges, coequal with the rights of the citizens, and not exclusive rights at any particular place off the reservation. The guarantee is of rights in common with all citizens of the United States.

QUESTIONS PRESENTED

Appellants' assignments of error, reduced to their essence, present a single, sharply defined issue, aside from the question of jurisdiction.

Article IV of the Makah Treaty provides in part:

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * "

Appellees contends that this provision of the treaty vested in members of the Makah Tribe a perpetual right of fishing at usual and accustomed grounds and stations off the Makah Reservation, without interference in any manner whatsoever by the State of Washington.

Appellants contend that the "off the reservation" right to fish secured by the treaty is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to regulate the taking of fish from the waters within its jurisdiction for the benefit of all its citizens.

SUMMARY OF ARGUMENT

A

(Jurisdiction of District Court)

The District Court was without jurisdiction over the defendants or of the subject matter of the action, in that

(1) The action in equity is one against public officers of the State of Washington as such, hence in truth and in fact an action against the State of Washington;

(2) This is an action against the state by Indians, who by Acts of Congress have been made citizens thereof, hence the United States District Court has no jurisdiction;

(3) Plaintiffs although citizens of the State of Washington are suing on behalf of the tribe, as wards of the Federal Government, and as such have no legal capacity to sue due to their disability, and any action on their behalf must be brought by the United States Government, through the United States District Attorney.

B

The district court's denial of defendants' motion for judgment on the pleadings is contrary to law in that the court's action is repugnant to the following established principles which are involved herein.

I.

A state's police power is one of the highest attributes of sovereignty, and that power has never been delegated by the several states to the Federal government.

II.

The police power can neither be abdicated nor bargained away, and is inalienable even by express grant.

III.

Upon admission into the Union, a state becomes possessed of all the rights and powers coequal with her sister jurisdictions.

IV.

The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. The Stevens Treaty of 1855 did not curtail or abridge the police power of the future State of Washington, and upon its admission into the Union, the state became endowed with full police powers.

V.

The protection of fish and the regulation of fishing is for the common benefit of the people, and legislation directed to that end is a valid and proper exercise of the police power. Over fish found within its water, and over wild game, the state has supreme control.

VI.

Fish and game laws of the State of Washington are regulatory measures and constitute a lawful exercise of the state's police power. It has for its purpose the necessary preservation of the state's commercial and game fisheries, and meets all the requirements that the lawful exercise of police power must be reasonable, nondiscriminatory, and nonarbitrary.

VII.

The fishing places in question are outside the boundaries of the Makah Reservation and within the sole jurisdiction of the State of Washington.

VIII.

The Makah Indian Treaty secured to the members of the federated Makah Tribe a vested easement right of ingress to and egress from their "usual and accustomed grounds and stations" outside the reservation, there to fish "in common with all citizens of the United States"; subject to any valid exercise of the right by the sovereign which is operative on all alike for the best interests of the state's aquatic resources.

IX.

Indian treaties are to be given a liberal construction, but must be considered in the light of current economic conditions prevailing in the development and conservation of our natural resources, having in mind the welfare of all the people.

X.

The Indian, by Act of Congress in 1924, has been made a citizen of the United States and of the state in which he resides. As such, he is entitled to all the rights, privileges and immunities accorded other citizens of the state, and to the equal protection of its laws, and is also subject to its laws.

XI.

Conservation of our fast diminishing natural resources is one of the chief concerns of organized government today. In the discharge of this important respon-

sibility for and on behalf of its people, the State of Washington is acting as much in the interest of the Indian citizen as any other, and its obligation toward him is just as great, for the Indian is now an integral part of its citizenry.

ARGUMENT

A

(Jurisdiction of the District Court)

I. THIS ACTION IN EQUITY IS ONE AGAINST PUBLIC OFFICERS OF THE STATE OF WASHINGTON AS SUCH, HENCE IN TRUTH AND IN FACT AN ACTION AGAINST THE STATE OF WASHINGTON.

A suit against officers of a state is a suit against the state itself although not brought against the state by name, where the state is the "real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In re Ayers, 123 U. S. 443, 505;

Reagan v. Farmers Loan, etc. Co., 154 U. S. 362, 38 L. Ed. 1014;

Fitts v. McGhee, 172 U. S. 516, 528, 43 L. Ed. 535;

U. S. v. Clausen, 291 Fed. 231, 238;

State ex rel. Pate v. Johns, 170 Wash. 125.

In the present action, it cannot be denied that the relief sought is against the State of Washington, through the only medium through which it can act, its officers and agents. Plaintiffs here seek immunity from the operation of certain laws. No relief, in truth and in fact, is sought against the defendants as individuals. It is an action to restrain the state from enforcing its fish and game laws with respect to the plaintiffs and any injunctive relief, if granted, could restrain only the individual defendants named. There would be nothing to prevent other agents, county or state, from enforcing the state laws from which the plaintiffs herein seek to escape the operation thereof. This is emphasized by the fact that B. M. Brennan, one of the defendants herein, is no

longer the Director of Fisheries of the State of Washington. Following a change in the state administration, Mr. Brennan was replaced by Mr. Fred J. Foster, who now occupies the position of Director of Fisheries, under gubernatorial appointment. There is no injunction restraining Mr. Foster in his official capacity from enforcing the state fish laws. The very tenor of the prayer for relief in the Bill of Complaint seeks immunity from the state law enforcement officials and those under their immediate supervision. Hence, it is obvious that the plaintiffs desire freedom from control of the state itself in so far as their fishing activities are concerned. Any contention to the contrary is based on pure legal fiction.

II. THIS IS AN ACTION AGAINST THE STATE BY INDIANS,
WHO BY AN ACT OF CONGRESS HAVE BEEN MADE CITI-
ZENS THEREOF, HENCE THE UNITED STATES DISTRICT
COURT HAS NO JURISDICTION.

The principle of law invoked in this contention does not need lengthy elaboration for it is established that a suit in a Federal Court against a state by one of its citizens, the state not having consented to be sued, is unknown and forbidden by law.

Fitts v. McGhee, 172 U. S. 516, 525, 43 L. Ed. 535;

Hans v. Louisiana, 134 U. S. 1, 10, 33 L. Ed. 842;

Keifer v. Reconstruction Finance Corporation, 306
U. S. 381, 83 L. Ed. 784.

III. PLAINTIFFS, ALTHOUGH CITIZENS OF THE STATE OF WASHINGTON, ARE STILL WARDS OF THE FEDERAL GOVERNMENT AND AS SUCH HAVE NO LEGAL CAPACITY TO SUE, DUE TO THEIR DISABILITY AND ANY ACTION IN THEIR BEHALF MUST BE BROUGHT BY THE UNITED STATES GOVERNMENT THROUGH THE UNITED STATES DISTRICT ATTORNEY.

The Indian occupies a novel role of dual citizenship. By Act of Congress, June 2, 1924 (Title 8, Sec. 3, U. S. C. A.), the Indian became a citizen and as such is entitled to all the immunities and benefits inherent to citizenship. At the same time, he is still a ward of the United States Government and subject to all rules and regulations made for his protection by authority of Congress. As said by Mr. Justice Vandevanter in *United States v. Nice*, 241 U. S. 591, 60 L. Ed. 1192:

“Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.”

Thus, it is recognized that the conferring of citizenship on Indians does not place them beyond the reach of congressional regulations, adopted for their benefit.

United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107;

Tiger v. Western Inv. Co., 221 U. S. 286, 55 L. ed. 738;

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820;

United States v. Nice, *supra*;

Brader v. James, 246 U. S. 88, 62 L. ed. 591.

The force and effect which the courts give to the rules and regulations adopted by Congress for the supervision of its Indian wards is poignantly stated by Mr. Justice Miller in the case of *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182:

"In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. * * * This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority. Neither the constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them."

Title 25, Section 175, U. S. C. A., provides as follows:

"In all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity. (Mar. 3, 1893, c. 209, Sec. 1, 27 Stat. 631.)"

Title 25, Section 476, U. S. C. A., further provides.

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by laws when ratified as aforesaid and approved by the Secretary of the Interior shall be re-

vocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

“In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior*; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.” (Italics ours.)

These statutes import the intent of Congress to exercise control over Indian affairs and make it mandatory that actions be brought for and on behalf of its Indian wards through legal representatives of the guardian.

The case of *United States v. Colvard*, 89 Fed. 312, was one in which it was held that the Federal District Court had jurisdiction over a suit in equity filed by the United States to enjoin trespass on Indian lands conveyed to the United States in trust, since the court has express statutory jurisdiction over suits at law and in equity brought by the United States, irrespective of the amount involved, and the United States has both a right and a duty to maintain such suits as may be necessary for the protection of its Indian wards. We quote from the opinion in this case handed down by Circuit Judge Parker:

“Since this is a suit in equity brought by the United States, there would seem to be no question as to the jurisdiction of the court to entertain it, as the District Court is expressly granted jurisdiction of suits at law or in equity brought by the United States, irrespective of the amount involved. 28 U. S. C. A. Sec. 41 (1). It is the right and the duty of the government to maintain such suits as may be necessary for the protection of its Indian wards. *United States v. Wright* (C. C. A. 4th) 53 F. (2d) 300; *United States v. Boyd* (C. C. A. 4th) 83 F. 547; *Id.* (C. C.) 68 F. 577; *In re Celestine* (D. C.) 114 F. 551, 552; *U. S. v. Winans* (C. C.) 73 F. 72, 75; *United States v. Flournoy Live-Stock & Real-Estate Co.* (C. C.) 71 F. 576, 579; *Id.* (C. C.) 69 F. 886, 894. And particularly is this true where the United States holds land in trust for the use and benefit of these wards and suit is necessary for the protection of the lands. *United States v. Wright, supra*; *United States v. Flournoy Live-Stock & Real-Estate Co., supra*.”

Other cases which might be cited as authority for the proposition that the mere granting of citizenship to the Indian does not remove the peculiar relationship of guardian and ward as between the Indian and the United States Government, and are precedence for our contention that an action like the case at bar must be brought, if at all, by the United States Government through the United States Attorney, are:

United States v. Fitzgerald, 201 F. 295;

Mosier v. United States, 198 F. 54;

Cramer v. United States, 261 U. S. 219;

United States v. Waller, 243 U. S. 452.

B

I.

A STATE'S POLICE POWER IS ONE OF THE HIGHEST ATTRIBUTES OF SOVEREIGNTY AND THAT POWER HAS NEVER BEEN DELEGATED BY THE SEVERAL STATES TO THE FEDERAL GOVERNMENT.

Under our form of government, the powers of the Federal government are limited to those granted to it,

either expressly or by implication, in the United States Constitution. All other powers are reserved to the State governments. This fundamental principle, with respect to the police power of the state, is cogently enunciated by the supreme court in the case of *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 10 L. Ed. 1060. We quote from page 625:

“To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be misunderstood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the States, and has never been conceded to the United States.”

II.

THE POLICE POWER CAN NEITHER BE ABDICATED NOR BARGAINED AWAY AND IS INALIENABLE EVEN BY EXPRESS GRANT.

From *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, at page 558:

“For it is settled that neither the ‘contract’ clause nor the ‘due process’ clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; *that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.*” (Italics ours.)

To the same effect: *Chicago & A. R. R. Co. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. Rep. 678; *Butchers’ Union S. H. & L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. Rep. 437; *Holden*

v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383; *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. Rep. 321; *Chicago, H. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 34 Sup. Ct. Rep. 400; *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 56 Sup. Ct. 611.

III.

UPON ADMISSION INTO THE UNION, A STATE BECOMES POSSESSED OF ALL THE RIGHTS AND POWERS COEQUAL WITH HER SISTER JURISDICTIONS.

Under the decisions of the Supreme Court of the United States, Congress was without power to admit the State of Washington into the Union shorn of the right to protect its wild game and fish upon land and waters, otherwise subject to its jurisdiction.

The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent sovereignty imports certain inherent powers which cannot be restricted either by express provision in the Enabling Act or by prior treaties. If such treaties exist at the time the new state is admitted, then the admission repeals the treaty to that extent.

The pronouncements of our supreme court provide a basis for the rule which may be succinctly stated as this: Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal Constitution, and that any other attempted limitation cannot be enforced. While there are numerous decisions sustaining this principle, no case furnishes a clearer enunciation of the rule than that of *Coyle v. Smith*, 211 U. S. 559, 55 L. Ed. 853 (which was reaffirmed

by this court in the very recent case of *Skiriotes v. State of Florida*, 313 U. S. 69, 61 Sup. Ct. 924). The Oklahoma Enabling Act provided that the state capitol should not be changed from the City of Guthrie until 1913. In 1910 the legislature passed an act providing for a change in contravention of this provision, and the question of the binding effect of the Enabling Act came before the court. The court concluded that this attempted limitation was not binding upon the state, saying at page 565:

“The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?”

After stating the contentions of counsel, the court referred to that provision of the constitution which authorizes Congress to admit “new states into this Union” and said (p. 567):

“‘This Union’ was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation

admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the constitution, but only such as had not been further bargained away as conditions of admission." (Italics ours.)

The final conclusion of the court is then summarized upon page 573 of the opinion, where the court said:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission.*" (Italics ours.)

Among the authorities cited in support of this statement is the case of *Ward v. Race Horse*, 163 U. S. 504, *supra*, clearly indicating that the court intended the rule to be applicable to limitations imposed by prior treaties as well as those inserted in enabling acts. And again, upon page 576 of the opinion, the court referred to the *Race Horse* case in the following language:

"In *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming." (Italics ours.)

We regard this statement as absolutely decisive on the point that the State of Washington acquired supreme control over its wild life when statehood was declared. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its

police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state.

This principle is affirmed in many cases by the supreme court:

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565;

Permoli v. First Municipality of New Orleans, 3 How. 589, 11 L. Ed. 739;

Strader v. Graham, 10 How. 82, 13 L. Ed. 337;

Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442;

Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487;

Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629;

Bolln v. State, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382;

Cardwell v. American Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423.

IV.

THE TREATY MAKING POWER WAS NEVER INTENDED TO ABRIDGE THE RIGHT OF A STATE TO REGULATE ITS STRICTLY INTERNAL AFFAIRS. THE STEVENS TREATY OF 1855 DID NOT CURTAIL OR ABRIDGE THE POLICE POWER OF THE FUTURE STATE OF WASHINGTON, AND UPON ITS ADMISSION INTO THE UNION, THE STATE BECAME ENDOWED WITH COMPLETE POLICE POWERS.

In construing the provisions of a treaty, the supreme court has upheld the police power of the states wherever possible.

In the case of *DeGeofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295, the court held that the treaty

making power was never intended to abridge the right of a state to regulate its strictly internal affairs. We quote from page 267:

“The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the acts of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.”

To the same effect:

Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. 1076;

Compagnie Francaise de Navigation A Vapeur v. State Bd. of Health, 186 U. S. 380, 394, 395, 46 L. Ed. 1209, 1216, 1217, 22 Sup. Ct. 811;

Patsone v. Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 34 Sup. Ct. 281.

The *Patsone* case involved the constitutionality of a wild game statute enacted by the Pennsylvania legislature making it unlawful for any unnaturalized foreign-born resident to kill wild birds or animals, and the validity of such statute as applied to an Italian citizen in view of a treaty with Italy consummated in 1871 guaranteeing equal protection and security for persons and property. The court held that the statute in question was not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment and did not prevent the state from exercising its power for preservation of wild life for its own citizens. We quote from the opinion delivered by Mr. Justice Holmes, page 146:

“It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve

for its own citizens if it pleases. *Geer v. Connecticut*, 161 U. S. 519, 529. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent."

Section 8 of the Enabling Act (Rem. Rev. Statutes I) under which Washington was admitted as a state, provides in part:

"And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, *on an equal footing with the original states, from and after the date of said proclamation.*" (Italics ours.)

It should be borne in mind that a treaty is not a contract. While it is the supreme law of the land, it may be repealed by Congress either expressly or by necessary implication. Neither does a separate rule obtain with respect to Indian treaties. As was said in the case of *Cherokee Tobacco v. United States*, 11 Wall. 616, 20 L. Ed. 227, at p. 621 of 11 Wall:

"A treaty may supersede a prior act of Congress * * *, and an act of Congress may supersede a prior treaty. * * *. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian Nations, within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the

government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered."

To this may be added the general rule of construction discussed under the previous heading that the admission of a state into the Union imparts an equality of power over internal affairs on an equal footing with the other states. And in *Escanaba Company v. Chicago*, 107 U. S. 678, the court speaking through Mr. Justice Fields said, at page 683:

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

And further at page 688:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states.

The leading case upon this, both because of its statement of the general rule and also because of its remarkable similarity to the case at bar, is the case of *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244. In that case it appeared that the Treaty of 1869 between the Bannock Indians and the United States contained the following provision:

“But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.”

At the time of the passage of that treaty there was in existence an act of Congress creating the territory of Wyoming, which provided that nothing in the act should impair the treaty rights of the Indians as they then existed. In 1890, however, Wyoming was admitted into the Union under an enabling act, section 1 of which act provided:

“That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified, and confirmed.”

In 1895 an act was passed by the legislature of Wyoming regulating the killing of wild game, and in the same year the petitioner, Race Horse, a member of the Bannock tribe, was arrested and charged with killing elk upon unoccupied land of the United States in violation of this statute. The case went by *habeas corpus* to the Supreme Court of the United States, which court held that the admission of Wyoming upon an equal footing

with the original states operated *pro tanto* to repeal the treaty in so far as it might be construed to restrict the power of the sovereign state to regulate the taking of wild game. In the course of its opinion the court said (p. 511):

“The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. *These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority.* But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.” (Italics ours.)

And reviewing many authorities in respect to this general rule, the court continued (p. 514):

“The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the

other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

We shall briefly compare the facts in that case with those in the case at bar. First, as to the territorial act, in the *Race Horse* case the territorial act provided that the organization of such territory should not be deemed destructive of any treaty rights of the Indians. The act of Congress of March 2, 1853 (10 Stat. at Large, page 172), which organized the territory of Washington, contains a similar provision with respect to Indian treaties. Second, as to the treaties, in the *Race Horse* case the provision of the treaty was that the Indians should have the right to hunt upon all unoccupied lands of the United States as long as peace subsisted. In the present case the treaty under consideration gives the Indians the right to hunt upon all open and unclaimed lands (a provision identical with the Bannock treaty), and in addition the

right to fish at all usual and accustomed places. Third, as to the Enabling Act, the Wyoming Enabling Act admitted Wyoming into the Union "on an equal footing with the original states in all respects whatever." The Washington Enabling Act provides that the states named therein "shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states." The phraseology is somewhat different but the effect is the same.

It will thus be seen that in their material facts there is no difference between the *Race Horse* case and the case at bar.

Neither is there anything inconsistent with that decision in the subsequent case of *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089. The question of the power of the state was not there involved. That was merely a controversy between the Indians and a riparian owner who sought to exclude the Indians from taking advantage of a servitude imposed upon the land by the United States, which was the original proprietor and owner of the land. Indeed, the *Race Horse* case is nowhere mentioned in that decision.

V.

THE PROTECTION OF FISH AND THE REGULATION OF FISHING IS FOR THE COMMON BENEFIT OF THE PEOPLE, AND LEGISLATION DIRECTED TO THAT END IS A VALID AND PROPER EXERCISE OF THE POLICE POWER. OVER FISH FOUND WITHIN ITS WATERS, AND OF WILD GAME, THE STATE HAS SUPREME CONTROL.

The decisions of the courts in this country, from the supreme court down, are in unison in holding that the

wild life, including animals, fish and fowl, is under the control of the state which holds the title thereto in trust for all the people, and in the regulation of and restrictions upon the taking of game and fish within the jurisdiction of a state, the sovereign is but dealing with its own property over which its control is absolute.

The supreme court of the United States, in the early case of *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, very succinctly and clearly enunciated the nature of this trust and ownership by the state as follows:

“ ‘Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 Pet. (367) 410 (10 L. Ed. 997), represents its people, and the ownership is that of the people in their united sovereignty’.”

This principle has never been departed from, but on the contrary, has been the basis for permitting the States to exercise the widest latitude of discretion in determining what measures are necessary and expedient to protect these valuable natural resources.

The United States Supreme Court early declared that each State has the right and power of a proprietor and sovereign to control, regulate, restrict, and license the

enjoyment by individuals of the privilege of taking fish from its public waters.

McCready v. Virginia, 94 U. S. 391, 397;

Manchester v. Massachusetts, 139 U. S. 240, 266, 11 Sup. Ct. 559.

Numerous holdings might be cited, but we refer to the latest pronouncement of the supreme court in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (decided March 2, 1936).

The suit was brought to enjoin the State of California from enforcing certain provisions of the State Fish and Game Code, alleged to contravene the commerce clause and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

The facts are summarized in the opinion delivered by Mr. Justice Sutherland, as follows, quoting from page 423:

"Appellant is a California corporation engaged in the business of manufacturing, from the meat of sardines, fish flour for human consumption. The sardines are caught by fishermen upon the high seas beyond the three-mile limit to which the jurisdiction of the state extends, sold to appellant, and brought into the state and there reduced to fish flour at appellant's reduction plants. The fish flour is made with the expectation of selling and shipping it in interstate and foreign commerce; and it is so sold and shipped and is used as food in the United States and foreign countries. Sardines are a migratory fish found in great numbers in the Pacific Ocean beyond the three-mile limit as well as within that limit. So far as known, they spawn upon the open seas. In the process of reducing the fish, appellant uses a portion for producing flour for human consumption, the remainder being converted into a meal used for chicken feed, and into fertilizer, fish oil and other nonedible substances.

"Sardines caught in the same way are also purchased by packers, who clean, cook, and can or preserve them for human food, using in that process only a part of the fish and utilizing the remainder for reduction into non-edible products.

"The provisions of the Fish and Game Code which appellees threaten to enforce against appellant and those necessary to be considered in that connection are copied in the margin. The bill alleges that appellees will prevent appellant from manufacturing fish flour in its reduction plants while at the same time permitting packers to use sardines, taken from the waters of the state or those outside, in their packing plants."

This case reaffirms several rules relative to a state's police power over its wild game and fish to which our Supreme Court is unqualifiedly committed.

(a) *That a state has supreme control over its wild life and (b) may conserve its aquatic resources as it deems expedient, although interstate commerce may be remotely affected.*

Quoting from page 425:

"There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local. Whether the product is consumed within the borders of the state or shipped outside in interstate or foreign commerce are matters with which the act is not concerned. *The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game generally, the state has supreme control.* Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from

the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz v. Hesterberg*, 211 U. S. 31, 39-40.

"If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to *Silz v. Hesterberg*, *supra*, pp. 39 *et seq.*, and *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 F. (2d) 111, where the decisions are collected." (Italics ours.)

(c) *State regulations bearing a reasonable relation to an object within the state police power—e. g. the conservation of the State's fish supply—cannot be declared invalid because a court may regard them as ineffectual, or harsh in particular instances or as aids to an objectionable policy.*

Quoting from page 427:

"These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. *McLean v. Arkansas*, 211 U. S. 539, 547-548. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77. And see, generally, *Chicago, B & Q. R. Co. v. McGuire*, 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (p. 569), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance'."

VI.

FISH AND GAME LAWS OF THE STATE OF WASHINGTON ARE REGULATORY MEASURES AND CONSTITUTE A LAWFUL EXERCISE OF THE STATE'S POLICE POWER. IT HAS FOR ITS PURPOSE THE NECESSARY PRESERVATION OF THE STATE'S COMMERCIAL AND GAME FISHERIES, AND MEETS ALL THE REQUIREMENTS THAT THE LAWFUL EXERCISE OF POLICE POWER MUST BE REASONABLE, NONDISCRIMINATORY, AND NONARBITRARY.

The statute in question is nondiscriminatory and uniformly operates on all citizens alike. It is not a measure designed to regulate Indian fishing, but on the contrary is a conservation measure, having for its purpose the protection and perpetuation of the commercial fishing industry in the State of Washington.

The test for determining whether or not the legislative enactment is a proper exercise of the police power is plain, simple, and sound, and is announced in *Lawton v. Steele*, 152 U. S. 133, which has been frequently cited with approval. The Supreme Court held that laws prohibiting the use of certain types of gear in state waters was a valid exercise of state police power to preserve from extinction fish in waters within its jurisdiction. We quote from page 140 of the opinion:

“An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, *unless it is plainly violative of the Constitution or subversive of private rights.*” (Italics ours.)

And again in the same case at page 137, it was stated that:

“It must appear first, that the interests of the public generally, as distinguished from those in a particular class, require the interference; and, second, that the

means are reasonably necessary for the accompaniment of the purpose and not unduly oppressive upon individuals."

The state's power to regulate its fisheries, and the extent thereof, is well summarized in 22 *Am. Juris.*, paragraph 34, page 691, as follows:

"The state has the power to regulate fisheries in public and private streams, and to adopt such appropriate means as may seem best to it for the preservation of edible fish for the benefit of the people; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution. The right of the state to regulate fisheries for the preservation of fish applies not only to edible fish but also to those valuable for any purpose. This right to regulate fish and fisheries may be based either on the police power of the state to enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth, or on the circumstance that the fish in the waters of the state, as well as the game in its forests, belong to the people in their sovereign capacity, and are not the subject of private ownership, except in so far as the people may elect that they shall be. It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors, as well as of trespassers. The state may prohibit the catching of fish within its waters; if it allows the catching, it may regulate it by the imposition of such conditions, restrictions, and limitations as it deems needful or proper. The state may prohibit the taking of fish by methods other than those prescribed by law, may prescribe the size of fish taken, may prohibit the pollution of waters within its limits, and may also either prescribe limitations as to the disposition of fish once they have been taken or forbid their sale."

In 11 *R. C. L.*, paragraph 34, page 1046, we find this statement:

“By reason of the fact that title to fish and game within the boundaries of a state is vested in the people of the state in their sovereign capacity, the legislature has greater power over such property than it has over almost any other commodity, and in order to preserve such property to the people of the state, the law making assembly may enact that only citizens of the state shall take fish from the waters within its jurisdiction.”

Under the state's police powers to regulate its fisheries, the courts have held that it is within its powers to protect its waters from pollution (*People v. Truckee Lbr. Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581); to declare as public nuisances any obstruction of its streams or gear used in illegal fishing (*State v. Mavrikas*, 148 Wash. 651); to compel adequate fishways for free migration of fish (*Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 6 Am. Rep. 247, aff'd 15 Wall (82 U. S.) 500, 21 L. Ed. 133); to regulate the time of taking (*State v. McGuire*, 24 Ore. 366, 33 Pac. 666, 21 L. R. A. 478); the manner of taking (*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 U. S. (L. Ed.) 385); the possession of (*State v. Schuman*, 36 Ore. 16, 58 Pac. 661, 47 L. R. A. 153); the disposition of (*Commonwealth v. Gilbert*, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439); and the use of (*Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d) 111); provide for the forfeiture of gear used in illegal fishing (*Lawton v. Steele*, *supra*) and make it a criminal offense to take fish in violation of its regulations (*Lawton v. Steele*, *supra*).

Reasonable regulation also includes the licensing of sports and commercial fishermen. A state may refuse to license citizens of other states (*State v. Kofines*, 33 R. I. 211, 80 Atl. 432, Anno. Cas. 1913C 1120; *Wharton v. Wise*, 153 U. S. 155, 14 S. Ct. 783, 38 U. S. (L. Ed.) 669.)

The state may lawfully graduate the license fee schedule according to the types of fishing in which the licensees engage (*State v. Hanlon*, 77 Oh. St. 19, 82 N. E. 662, 13 L. R. A. (N. S.) 539).

The licensing of fishing privileges has been sanctioned as a valid exercise of police power in the regulation and protection of this valuable aquatic resource. (*State v. Snowman*, 50 L. R. A. 545; *Lacoste v. Department of Conservation*, 263 U. S. 545; *Anderson v. Smith* (C. C. A. Ninth Circuit) 71 F. (2d) 493; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422).

In the *Lacoste* case the Supreme Court decreed that it was within the valid exercise of the state's police power to require payment of a tax upon the skins or hides of wild animals as a condition precedent to transferring its title to the dealer paying the tax.

We quote from page 550:

"Our examination of this act discloses no reason why the decision of the state court should be disturbed. The legislation is a valid exertion of the police power of the State to conserve and protect wild life for the common benefit. It is within the power of the State to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership."

In the *Anderson* case the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Wilbur, upheld the right of the Territory of Alaska to fix license fees for fishing in waters of Alaska, and in so doing may discriminate between residents and non-residents, provided that license exacted of the citizens of the United States nonresident in Alaska is not so exorbitant as practically to prohibit or so unreasonable as to interfere with rights of fishing granted by Congress.

In the *Bayside Fish Flour Co.* case the United States Supreme Court sustained the right of the State of California to exact a license for each plant or place of business engaged in the preservation of fish and the manufacture of fish scrap products.

VII.

FISHING PLACES IN QUESTION ARE OUTSIDE THE BOUNDARIES OF THE MAKAH INDIAN RESERVATION AND WITHIN THE SOLE JURISDICTION OF THE STATE.

Under the explicit terms of the treaty, the fishing grounds in question are within the jurisdiction of the State of Washington.

The sole issue then is resolved into whether or not the state is circumscribed in its police powers by the reservations in the treaty of "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States."

Appellants contend their position is conclusively determined in *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, and *Kennedy v. Becker*, 241 U. S. 556, Sup. Ct. 705. Also to the same effect is *Lawton v. Steele*, 152 U. S. 133, wherein we find this pertinent language at page 139:

"As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish,

is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.”

The decisions of the supreme court of the State of Washington follow these cases without departure.

This same question has been passed upon by the supreme court of the State of Washington in five cases. *State v. Towessnute*, 89 Wash. 478; *State v. Alexis*, 89 Wash. 492; *State v. Meninock*, 115 Wash. 528; *State v. Wallahee*, 143 Wash. 117; and *State v. Tulee*, Vol. 107 Wash. Dec. 44.

In construing this identical article of the Stevens Treaty, these decisions uniformly and unequivocally hold that the Indians’ fishing rights “at usual and accustomed grounds and stations” off the reservation are subject to the paramount and superior right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of fish from the waters of its jurisdiction, and that an Indian fishing off the reservation must do so “in common with all citizens of the United States.”

The question of Indian fishing rights arising under the Stevens Treaty of 1855 was first tested in the Washington Territorial Court in the case of *U. S. v. Taylor*, 3 Wash. Terr. 88, decided January 25, 1887. The United States brought suit to restrain one Frank Taylor from maintaining a fence around a large body of land abutting on the Tum Water Fisheries on the Columbia River which obstructed the land approach to the fishery. The defendant had obtained a patent in fee simple from the United States to the lands and claimed a right to enclose his property for the protection of his growing crops. An

injunction was granted by the district court and reversed by the supreme court of the territory on the grounds that the treaty imposed a servitude on the land which could not be extinguished by the vesting of a fee simple title. The police power of the future state was not considered. The court confined its decision to granting the Indian his primitive rights to fish by ancient methods for food for himself and family.

Governor Stevens made treaties with several Indian tribes in the territory of Washington in the year 1855. Practically all of these treaties, if not all of them, contained a clause relative to fishing off the reservations. The clause in the Yakima Treaty similar to the one now under consideration next came before the supreme court of the State of Washington to determine the meaning of the phrase "in common with the citizens of the territory," in the case of *State of Washington v. Towessnute*, 89 Wash. 478, decided Feb. 4, 1916. Towessnute, contrary to state law, was fishing without a license, snagging salmon with a gaff hook, and catching fish without hook and line on the Yakima River. The case held that the Indian had exclusive fishing rights on the reservation and nothing but equality with the white man outside the reservation. That the main purpose of the government was to separate the Indian from the white man and care for the Indian in a district more confined. Yet, it was natural to indulge him with hunting and fishing at his old hunting and fishing grounds; that the white man might not by crafty statute cut off the Indian's privilege at these places outside the reservation. The court reviewed *Ward v. Race Horse*, 163 U. S. 504, involving the principle that Congress by act of admitting Wyoming

as a state revoked whatever in the treaty might have impaired the future police power of the state. The court also reviewed *U. S. v. Winans*, 198 U. S. 371, holding that land grants would not impair Indian easements on ancient fishing spots, that the easement privilege might not be put above police power. "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The Supreme Court of the State of Washington handed down on the same day the case of *State of Washington v. Alexis*, 89 Wash. 492, which is identical in all respects with the *Towessnute* case, except it involved the fishing rights of the Lummi Indians and the Muckelteeoh Treaty proclaimed in 1859, the language of the treaty being exactly the same as the Yakima Treaty. The court held the case was on all fours with the *Towessnute* case and on petition for rehearing, decided March 17, 1916, held that Congress in making provisions by an Indian treaty could not do so at the expense of the police power of the future state, notwithstanding the fact that the Indians were more or less dependent upon the fish for subsistence. The case was different from the *Towessnute* case in that the testimony showed the Lummi Indians gained a livelihood by trafficking in fish. The court said:

"Under Federal decisions, as we understand them, Congress, in making provisions for the Indians, could not do so at the expense of the police power of the future state. The Lummi case strikingly shows to what ravages the salmon industry of Washington is exposed by these Indian treaties, as they are sought to be interpreted."

The rights of the Yakima Indians were next adjudicated by the highest court of Washington in the case of *State of Washington, respondent v. George Meninock*, 115 Wash. 528, decided in April, 1921. Defendants were Yakima Indians maintaining their tribal relations and living on the Yakima reservation. They were adjudged guilty of illegal fishing 400 feet below the Prosser Dam in the Yakima River. The court affirmed the *Towessnute* case, finding that the pronouncements of our supreme court were fortified and in perfect consonance with the conclusion reached by the Supreme Court of the United States in *Kennedy v. Becker*, 241 U. S. 556, which was decided in 1916.

If there be any doubts as to the finality of the commitments of this court in the cases just cited, they are set at rest in the decision handed down in *State of Washington v. Jim Wallahee*, 143 Wash. 117, decided in March, 1927. The identical article of the Stevens Treaty now under scrutiny was considered for the fourth time by this court in connection with the state's right to punish a Yakima Indian for violation of state game laws outside the reservation. While this case did not involve fishing rights, this court not only adhered to the *Towessnute*, *Alexis* and *Meninock* decisions, but also quoted with approval the principles laid down in *Ward v. Race Horse*, 163 U. S. 504, as authority for the proposition that the sovereign powers inherent to a state passed to the State of Washington when admitted to statehood and held that Yakima Indians outside the boundaries of their reservation had no greater immunity to state game and fish laws than any other citizen of the state. The following decisive language is employed by this court:

"Under the authority of our own decisions and under the authority of *Ward v. Race Horse*, *supra*, had we not already decided the question, the judgment would have to be and it is affirmed."

The factors controlling the holdings of this court on the broad proposition involved herein which was first announced in the *Towessnute* case, and has been fortified on each of the three succeeding occasions, are very poignantly regimented in the *Wallahee* decision at page 118:

"This is the identical treaty and, indeed, the identical article of the treaty discussed and considered by this court in *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041, and *State v. Meninock*, 115 Wash. 528, 197 Pac. 641. Those cases, however, are concerned only with the fishing rights under the treaty, while this case involves the hunting privilege. Appellant seems to contend that those cases are not decisive of this because of the employment of the term 'in common with the citizens of the territory' in connection with the fishing rights, while no such limiting phrase is used in connection with the hunting right or privilege.

"It is true that in the *Towessnute* case, an argument was based upon these words, but only as an added consideration. *The real question and the whole question was decided by that part of the opinion which holds that the United States government was the sovereign and did not undertake to part with its sovereign rights by the treaty, that the Yakima tribe was not an independent nation nor a sovereign entity of any kind, the Indians being mere occupants of the land, and at that time and ever since were subject to the sovereignty of the United States; that then, and at all times up to statehood, the Federal government had the sovereign power to regulate or forbid the taking of game; and within our territorial jurisdiction, that sovereign power passed to the state of Washington when admitted to statehood. The other cases in this court follow the Towessnute case, though in the Meninock case Judge Parker ably supported and added to the argument of the earlier case. It is useless*

to repeat or quote from these earlier decisions. Almost every word is in point, and we are bound by their logic no less than by the rule of precedent." (*Italics ours.*)

The Ninth Circuit Court of Appeals in the case of *United States of America* on behalf of its ward, *Sampson Tulee v. House* (decided April 3, 1940), held that while the court had jurisdiction of the case, it was not a proper one for the exercise of such jurisdiction and following the rule laid down in the case of *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, held that the cause should be tried in the state courts. The case was then carried up through the state courts to the supreme court of the State of Washington where an *en banc* decision was filed on January 13, 1941. In the case of *State of Washington v. Sampson Tulee*, 107 Wash. Dec. 42, the supreme court reviewed all previous opinions of the court and adhered thereto.

We further invite the court's attention to decisions from other states involving Indian fishing off the reservation.

State v. Morrin, 117 N. W. 1006 (1908), the Wisconsin Supreme Court held the treaties of 1843 and 1854 between the United States and the Chippewa Indians, preserving to such Indians the right to hunt and fish on the territory ceded by them to the United States, were abrogated so far as such territory was included within the State of Wisconsin by the admission of the state into the Union under *Ward v. Race Horse*, decided in 1895. The defendant was a Chippewa and was convicted of the violation of state laws by using gill nets to fish in the waters of Lake Superior. The court also predicated its decision on the fact an Indian was made a citizen under act of Congress, 1887:

"His status is like that of every other citizen, and subjects him to penalties for the violation of any state law."

State v. Johnson, 249 N. W. 284, decided by the Supreme Court of Wisconsin in 1923. A Chippewa Indian, while hunting for deer out of season mistook a white man for a deer and shot him. The locus of the crime was on the Indian reservation. The defendant was a tribal Indian, holding land on the reservation, held in trust by the government. The questions involved were: 1. Had the state court jurisdiction to try and determine the prosecution of an Indian for a crime committed on patented land? 2. Had the state jurisdiction to try an Indian for the crime of hunting out of season within the exterior boundaries of a reservation? Both were answered in the affirmative.

The Supreme Court of Michigan in an unanimous decision adopted the same position taken by this court in the case of *People v. Chosa*, 252 Mich. 154, 233 N. W. 205, decided in 1930. This case involved the rights of Indians under treaty to hunt and fish in violation of general game laws of the state on lands ceded by their tribe to the United States. After reciting the applicability of such holdings as *Geer v. Connecticut*, *Ward v. Race Horse*, *United States v. Winans*, *Kennedy v. Becker*, the court said:

"These cases are conclusive on the effect of the treaties at bar. The treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the state.

* * * * *

"As a restriction on operation of State game laws, it would be foreign to our system of government in pro-

viding control of sovereign powers of the State by an officer of another sovereignty. It must, therefore, be held that defendants are subject to the game laws of the State, on the lands covered by the treaties, to the same extent as the general public.

"This ruling is sustained by another consideration advanced by the people.

* * * * *

"When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country. 11 C. J. p. 786."

The Federal courts in this district have interpreted Indian fishing rights under the Stevens Treaty in the following cases:

The James G. Swan, 50 Fed. 108;

United States v. Alaska Packers, 79 Fed. 152;

Seufert v. Olney, 193 Fed. 200;

United States v. Winans, 73 Fed. 72;

United States v. Taylor, 44 Fed. 2;

United States v. Seufert Bros. Co., 78 Fed. 520.

VIII.

THE MAKAH INDIAN TREATY SECURED TO THE MEMBERS OF THE FEDERATED MAKAH TRIBE A VESTED EASEMENT RIGHT OF INGRESS TO AND EGRESS FROM THEIR "USUAL AND ACCUSTOMED GROUNDS AND STATIONS" OUTSIDE THE RESERVATION, THERE TO FISH "IN COMMON WITH ALL CITIZENS OF THE UNITED STATES"; SUBJECT TO ANY VALID EXERCISE OF THE RIGHT OF THE SOVEREIGN WHICH IS OPERATIVE ON ALL ALIKE FOR THE BEST INTERESTS OF THE STATE'S AQUATIC RESOURCES.

Under this heading we propose to incorporate our reply to appellees' contentions and set forth the state's position on the construction which must be given to the particular words in the treaty under examination.

Appellees contend that the language in the treaty "*the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States,*" secured to the Makah Tribe not only an easement right of occupancy, but also a property right in the fish, which are protected under the Fourteenth Amendment to the Constitution of the United States, without interference in the exercise of this right in any manner, by regulation or otherwise, by the State of Washington.

It is the State's contention that the treaty imposed a perpetual easement on the ancient fishing sites, there to fish in common with all citizens of the United States, subject to the paramount and superior right of the state under the exercise of its sovereign police powers to regulate the taking of fish from the waters within its jurisdiction.

While we do not accede to the proposition advanced by appellee that, the treaty secured to the Indians a perpetual property right in the fisheries, the protection of alleged vested property rights sought to be invoked under the Fourteenth Amendment in derogation of the State's police power, is answered in the case of *Thomson v. Dana*, 52 Fed. (2d) 759, 762 (District Court D, Oregon):

"Therefore it must be concluded that the protection of property rights, and the equal protection of the laws, vouchsafed by the Fourteenth Amendment, depend entirely upon the same principles, when applied to regulation of the fisheries of a state. See *Patsone v. Pennsylvania*, 232 U. S. 138, 143, 34 S. Ct. 281, 58 L. Ed. 539. Conservation of fish for the common good of all citizens of a state is paramount, and reasonable regulations to attain that end do not infringe upon the property pro-

tective, the equality, nor even the commerce clauses of the Constitution of the United States.”

To determine what rights the Indians secured unto themselves under the Stevens Treaty of 1855, requires an excursion into the history of Indian litigation.

The status of Indian title first came before the Supreme Court of the United States in 1810 in the case of *Fletcher v. Peck*, 6 Cranch. 87, 3 L. Ed. 162, where the court held that the State of Georgia was seized in fee of certain lands to which the Indian title had not been extinguished. In concluding that opinion, Justice Marshall said (page 141):

“The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.”

This case was followed in 1923 by the famous case of *Johnson v. McIntosh*, 8 Wheaton 542, 5 L. Ed. 681. That case involved the question of whether or not certain Indians had a right to convey land occupied by them without the consent of the Federal government. The court held that the fee simple title to the Indian lands was vested first in the European nations by right of discovery and then in the government by treaty and by the Revolutionary War.

We quote from page 592:

“However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the

law of the land, and cannot be questioned. * * * However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual conditions of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."

In 1831 the *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, was decided. That case involved the question of whether or not the Cherokee Nation was a foreign state in the sense that it might sue the State of Georgia in the supreme court under that provision of the constitution which gave to the court jurisdiction over controversies between states and foreign states. Justice Marshall answered this question in the negative, saying (page 17):

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian.*" (Italics ours.)

In the following year the case of *Worcester v. Georgia*, 6 Peters 515, 8 L. Ed. 483, came before the court where it was held that Congress under the constitution had the right to regulate commerce and intercourse with the Indian tribes and that this power could not be curtailed or restricted by state legislation.

In 1842 the case of *Martin v. Waddell*, 16 Peters 367, 10 L. Ed. 997, was decided by the highest court. That

case involved a controversy between certain persons who claimed title to certain oyster beds in New Jersey. The plaintiffs claimed by conveyances under a charter granted to the Duke of York by Charles II of England. The defendant claimed under patent from the State of New Jersey. The court held that no fishing rights passed under the charter by reason of its peculiar provisions, and that such rights were consequently vested in the State of New Jersey. At the same time, however, the court observed that the grant to the Duke of York might have included all of the attributes of sovereignty, saying (p. 409):

"The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned. But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown, in the country discovered by its subjects, on this continent; and the principles upon which it was parceled out and granted.

"The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants." (Italics ours.)

This case, we submit, is absolutely decisive upon this proposition. The ruling in substance was, that title to the oysters in question first vested in the king by right

of discovery, and then in the State of New Jersey by reason of the Revolution. The opinion clearly holds that the Indian right of occupancy does not include the title to wild game, which is vested in the nation, and to which title the states have succeeded.

In 1846 the question of the power of the Federal government to extend its criminal statutes over lands occupied by the Indians came before the court in the case of the *United States v. Rogers*, 4 Howard 566, 11 L. Ed. 1105. This power was affirmed by the court in the following language (p. 571):

"It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States *and under their authority*. The native tribes who were found on this continent at the time of its discovery had never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, *and the Indians continually held to be, and treated as, subject to their dominion and control.*" (Italics ours.)

The court after concluding that it was useless to inquire into the abstract justice of this right, continued:

"It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit to dispute, *that the Indian tribes residing within the territorial limits of the United States are subject to their authority*, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."

Congress has always exercised complete sovereignty over the property and rights of the Indians (*Cherokee Tobacco v. United States*, 11 Wall. 616, 20 L. Ed. 226; *United States v. Cook*, 19 Wallace 591, 22 L. Ed. 210; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Butz v. Northern Pacific Railway Company*, 119 U. S. 55, 30 L. Ed. 330; *United States v. Kagama*, 118 U. S. 375, 30 L. Ed. 228; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. Ed. 306; *Cherokee Nation v. Railway Company*, 135 U. S. 641, 34 L. Ed. 295; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. Ed. 299; *Conley v. Ballinger*, 216 U. S. 84, 54 L. Ed. 393).

While the tribal organizations were recognized for the purpose of convenience in dealing with the Indians, even this form of dealing was abolished by Act of Congress of March 3, 1871 (Section 2079, Revised Statutes).

From the language in the treaty it is plain that as to streams running through and bordering on the Makah reservation the exclusive right of taking fish in such waters is reserved to the confederated tribe.

It is the cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every section, clause, or word used (25 R. C. L. 246, p. 1004).

Clearly, from the language employed, "at their usual and accustomed grounds and stations" outside the reserved area, it was intended to mean that they had certain fishing rights outside the reservation, and were not to be restricted solely thereto.

We do not ordinarily secure a restriction of an existing right. We ordinarily secure a benefit. We do not ordinarily secure a curtailment of what is already possessed.

What rights were secured? Not common fishing rights with the white man outside the reservation. If that had been the intention, appropriate words would have been employed. The words used were: "at usual and accustomed grounds and stations in common with all citizens of the United States."

The only logical construction to be given this significant language is that it impressed upon all the domain included in this large cession of land the Indians made to the government a perpetual easement to guarantee the tribe ingress to and egress from "*usual and accustomed grounds and stations*," and this, no matter if the ceded lands were thrown open to settlers, no matter if white men obtained a fee simple patent, they always took it subject to the right of the treaty Indians to go to and from said ancient fishing grounds and enjoy fishing at their accustomed grounds and stations.

That this was the intendment is made clear in the case of *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089. In that case it appeared that the defendant, Winans, was the owner of certain lands adjoining an ancient and accustomed place of fishing of the Yakima Indians on the Columbia River. Winans erected a fish wheel at this place and refused to allow the Indians to go across his land for the purpose of fishing. The government, in behalf of the Indians, brought an action to enjoin this refusal and the court held that this provision of the treaty

was intended to cover a situation of this nature. In the course of that opinion the court said (p. 381):

“The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.”

There was no question there involved of the power of the state to regulate the exercise of that right, neither does it appear that the Indians there sought to exercise the right in violation of state law. Indeed, the court was careful to make it clear that the treaty did not interfere with the police power of the state, as appears from that portion of the opinion where it said (p. 384):

“*Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.*” (Italics ours.)

In short, this reservation merely affords easements to make possible the enjoyment of the fishing rights, but it does not curtail the authority of the state in the exercise of its police power to regulate the right itself. That is made plain in the opinion of Mr. Justice Hughes in *State ex rel. Kennedy v. Becker*, 241 U. S. 556, 36 Sup. Ct. 705.

In the *Becker* case the supreme court said it was within the competency of the State of New York in the exercise of its sovereign police power to regulate this right precisely as if the land in question had never constituted part of the original land which was ceded.

The *Becker* case involved the proper construction of a certain treaty with the New York Indians, which treaty

provided for the conveyance of certain lands by the Indians and then contained the following reservation:

“Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed.”

The case was a habeas corpus proceeding brought on behalf of certain of the members of this tribe who had been arrested for taking fish in violation of the game laws of New York. The court held that this reservation was a reservation of a right to go upon the lands and exercise hunting and fishing privileges, but that it did not constitute any immunity from general police power statutes of the state regulating the taking of wild fish and game. In the course of its opinion, the court observed:

*“The controversy relates solely to the state power over these Indians The argument for the plaintiffs in error has taken a wide range, and embraces an extended history of the dealings with the Six Nations. We do not find it to be necessary to review this interesting history, as the question to be determined is a narrow one. The locus in quo is within the state of New York, being within 1 mile from the point where Eighteen Mile creek empties into Lake Erie. It is not within the territorial limits of the Indian Reservation on which the Senecas reside. It is within the territory which was ceded by the Seneca Nation to Robert Morris by the treaty of the ‘Big Tree,’ of Sept. 15, 1797 [7 Stat. 601] and the question turns upon the construction of this treaty; that is, no consequences which attached to the reservation therein of fishing and hunting rights upon the lands then granted. * * **

“The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not

disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre*, to the extent defined; that is not questioned. *The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the state.*

" * * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U. S. 371, 384, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 (12 Stat. at L. 951), said (referring to the authority of the State of Washington): 'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.'" (Italics ours.)

Surely no one would seriously contend it is within the power of the Indian and beyond the power of the state to prevent the taking of fish by dynamite, or say that the white man is restricted in his methods of taking fish as

a conservation measure, as a necessary precaution to prevent exhaustion of the supply, and the Indian without restraint can use explosives or other destructive methods while fishing alongside the white fisherman.

Once the right of the state to enter the field to do that much is recognized, where is the line of demarcation?

The state can surely impose reasonable regulations where designed for the preservation of the fish in its waters. If you recognize the existence of the power, then the only question to be determined is whether its exercise is arbitrary, capricious or discriminatory. (*Lawton v. Steele, supra.*)

IX.

INDIAN TREATIES ARE TO BE GIVEN A LIBERAL CONSTRUCTION, BUT MUST BE CONSIDERED IN THE LIGHT OF CURRENT ECONOMIC CONDITIONS PREVAILING IN THE DEVELOPMENT AND CONSERVATION OF OUR NATURAL RESOURCES, HAVING IN MIND THE WELFARE OF ALL THE PEOPLE.

We readily recognize and agree that Indian treaties are to be construed in a broad and liberal spirit.

We think, however, in the interests of the Indians of today and the obligations owing to them from the State of Washington in the light of their present status as full-fledged citizens, an Indian treaty must be reconciled in the light of present day conditions because the respective positions of both parties to the treaty, the red man and the white man, the sovereign state and the Indian nation, have changed. In fact, this is the express pronouncement of the Supreme Court in the case of *State ex rel. Kennedy v. Becker*, 241 U. S. 556, 36 S. Ct. 705, 60 L. Ed. 1166, at page 562 of 241 U. S., 36 S. Ct. 705, 707:

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance,—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. * * * ."

Mr. Justice Hughes, in the case of *West Coast Hotel Company v. Parrish*, 300 U. S. 379 (commonly known as the Washington Minimum Wage Law Case), stated that the reasonableness of the exercise of the police power of the state must be considered in the light of current economic conditions.

The word "economic" is defined in Webster's New International Dictionary, Second Edition (1938), as follows: "Of or pertaining to the management of the affairs of a government or community with reference to its source of income, its expenditures, the development of its natural resources, etc., * * * ."

X.

THE INDIAN, BY ACT OF CONGRESS IN 1924, HAS BEEN MADE A CITIZEN OF THE UNITED STATES AND OF THE STATE IN WHICH HE RESIDES. AS SUCH, HE IS ENTITLED TO ALL THE RIGHTS, PRIVILEGES AND IMMUNITIES ACCORDED OTHER CITIZENS OF THE STATE, AND TO THE EQUAL PROTECTION OF ITS LAWS, AND IS ALSO SUBJECT TO ITS LAWS.

In the case of *Cherokee Nation v. State of Georgia*, 30 U. S. (5 Pet. 1) 1, decided in 1831, Chief Justice

Marshall spoke of the Indian tribes as being in a "state of pupilage; their relation to the United States resembles that of a ward to his guardian." Congress has always exercised complete sovereignty over the Indians and Indian property. In the gradual unfoldment of the government's program to emancipate the Indian, the evolution of the Indian to the full stature of citizenship is one of the most interesting. In the case of *Choteau v. Burnet*, 283 U. S. 691, it was held that the income received from the United States by an Indian, a member of the Osage tribe, as a share from the royalties from the gas and oil leases made by the tribe, is subject to Federal income tax. Mr. Justice Roberts, delivering the opinion of the court, very pointedly sets forth some of the corresponding obligations of citizenship:

"The course of legislation discloses that the plan of the Government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the ownership of property, including the duty to pay taxes."

It has been a policy of the national government to encourage the Indians to abandon their tribal relations and to adopt the life and customs of civilization. Looking to this end, various treaties with the Indian tribes, and special acts of Congress, have provided for allotment of lands to individual Indians, which lands were ultimately to become their property. Such Indians have been required to sever their tribal relations, live on their allotments, and adopt the life and habits of civilized white men. As a further inducement to complete abandonment of their tribal status and old ways of living, Indians to

whom such allotments were granted were made citizens of the United States. The Act of Congress of February 8, 1887 (24 Stat. 388, p. 6), known as the "Dawes Act," provided that "Every Indian born within the territorial limits of the United States, to whom allotments (of land) shall have been made under the provisions of this act, or under any law or treaty, * * * is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." An Act of Congress of March 3, 1901, amending the "Dawes Act," conferred citizenship on the same terms to all Indians in the Indian Territory. And finally, on June 2, 1924 (43 Stat. 253), Congress enacted "That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States."

The rule found in 11 Corpus Juris 786 was cited in *People v. Chosa*, 252 Mich. 154, 162, 233 N. W. 205.

"When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country."

Our courts have held that merely because a party is an Indian, even a tribal Indian, does not necessarily exclude him from the jurisdiction of the state courts nor exempt him from state law. A tribal Indian may be prosecuted in the state courts for a crime committed within the state but outside the reservation. *In re Wolf*, 27 Fed. 606; *United States v. Sa-Coo-Da-Cot*, Fed. Cas. No. 16212, 27 Fed. 923; *Rubideux v. Vallie*, 12 Kan. 28; *State of Washington v. Williams*, 13 Wash. 335, 43 Pac. 15. Moreover, unless specific stipulation is made in the enabling act giving the national government jurisdiction

over Indian reservations within a state, the state has jurisdiction within the reservations to enforce state law with respect to persons other than Indians. *Blue-Jacket v. Johnson County Commissioners*, 72 U. S. 737; *Harkness v. Hyde*, 98 U. S. 476; *Langford v. Monteith*, 102 U. S. 145; *United States v. McBratney*, 104 U. S. 621; *Draper v. United States*, 164 U. S. 240.

Concerning an Indian's status upon becoming a citizen of a state, the United States Supreme Court said in *In re Heff*, 197 U. S. 488:

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the state or territory in which he resides. *As a matter of constitutional law, an Indian appears to be entitled to the benefit of, and to be subject to, the laws of the State in which he resides the moment he becomes a citizen of the United States.* By virtue of the 14th Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges and immunities of other citizens of the state, and to the equal protection of its laws. *Slaughter-House cases*, 16 Wall. 36, 21 L. Ed. 394." (Italics ours.)

In re Heff involved the sale of liquor to an allotted Indian, and the court held that the allotted Indian was removed from the domain of the Federal statutes specifically relating to him as an Indian. The *Heff* case was subsequently overruled in *Hallowell v. United States*, 221 U. S. 317, 31 S. Ct. 587; *Tiger v. Western Improvement Co.*, 221 U. S. 286, 31 S. Ct. 578, and in *United States v. Nice*, 241 U. S. 591, 36 S. Ct. 696, but only in so far as the *Heff* case was authority for the proposition that an Indian on becoming a citizen of a state was no longer subject to national guardianship. The *Nice* case held that the mere fact an Indian had become a citizen, and subject to

state law, did not abrogate the United States authority over him.

“Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.”

U. S. v. Nice, 241 U. S. 591, 598.

We quote further from the *Nice* case at page 600:

“As pointing to a different intention, reliance is had upon the provision that when the allotments are completed and the trust patents issued the allottees ‘shall have the benefit of and be subject to the laws, both civil and criminal, of the state’ of their residence. *But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress?* The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with the power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable.” (Emphasis ours.)

The *Tiger* and *Hallowell* cases merely stand for the proposition that "guardianship" of the national government over the Indian remains unimpaired by the grant of citizenship, so far, at least, as the guardianship relates to the power of Congress over the lands and property of such citizen Indians. That is, citizen Indians living within a state, outside a reservation, may enjoy by virtue of this relationship to the national government a position of special privilege and protection, in certain respects, not enjoyed by other citizens of the state.

None of these cases overruled the *Heff* decision relative to the rights and obligations of an Indian upon becoming a citizen of a state. These authorities do not say that the conferring of citizenship on an Indian is an empty right, that he is not entitled to all the privileges and immunities enjoyed by a citizen under state government. Nor do they say an Indian citizen is not subject to its laws, upon acquiring its benefits.

In the case at bar, no legislation of Congress in behalf of its wards is in issue. In fact, the exercise of a state's inherent police power is beyond the jurisdiction of the federal government's interference. Concededly, it was within the power of Congress to withhold or even deny the granting of citizenship to the Indian. By conferring citizenship on the Indian, Congress could not compel the state to exempt him from the exercise of its police power which can only be validly exercised for the benefit of all citizens alike. Clearly, if a state discriminated against the Indian citizen in the exercise of its police power, the laws of the land would protect him and prevent such discrimination. (*Lawton v. Steele*, 152 U. S. 133.)

It is further observed that the federal enactment referred to in the *Hallowell* and *Nice* cases was in the interest of the Indians. Can it be argued less forcefully that the state, in enacting legislation looking to the conservation of its fisheries in the interest of its citizens, is doing so in any less degree for the benefit of the Indian citizen than for any other citizen? What other sovereignty than the state has jurisdiction to so legislate? The Federal government is powerless to invade a state's domain and regulate its fisheries. *Pollard v. Hagan*, 3 How. 212; *Smith v. Md.*, 18 How. 71; *Martin v. Waddell*, 16 Pet. 410; *McCready v. Va.*, 94 U. S. 391; *Manchester v. Mass.*, 139 U. S. 240; *Lawton v. Steele*, 152 U. S. 133; *Ill. v. Ill. Cent. R. R. Co.*, 146 U. S. 387; *Wharton v. Wise*, 153 U. S. 155; *Mann v. Tacoma Land Co.*, 153 U. S. 273; *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1; *The Abby Dodge*, 223 U. S. 166.

XI.

CONSERVATION OF OUR FAST DIMINISHING NATURAL RESOURCES IS ONE OF THE CHIEF CONCERNS OF ORGANIZED GOVERNMENT TODAY. IN THE DISCHARGE OF THIS IMPORTANT RESPONSIBILITY FOR AND ON BEHALF OF ITS PEOPLE, THE STATE OF WASHINGTON IS ACTING AS MUCH IN THE INTEREST OF THE INDIAN CITIZEN AS ANY OTHER, AND ITS OBLIGATION TOWARD HIM IS JUST AS GREAT, FOR THE INDIAN IS NOW AN INTEGRAL PART OF ITS CITIZENRY.

Circuit Judge Stevens, in his concurring opinion, in *Cerritos Gun Club v. Hall*, 96 Fed. (2d) 620, 630, described the need for conservation of our fast diminishing wild life in two poignant expressions, which we quote:

"Their preservation (referring to migratory birds of North America, subject to the Migratory Bird Treaty Act) is of great importance, and, therefore, a legitimate subject of governmental attention. * * * The nations have waited too long."

The State of Washington is here seeking to enforce adequate protective measures to prevent exhaustion of the salmon supply in the waters over which it has supreme jurisdiction. "After us the deluge" seems to be the maxim of many people in America today on the utilization of natural resources. Conservation seeks to insure to society the maximum benefit from the wise use of those resources. It is a timely field of action in the United States. As the nation comes of age and the limits of its resources and the character of its needs begin to appear more fully, the necessity for greater care in the utilization and renewal of the resources becomes impressive. It involves the welfare not only of the present generation but future generations whose material prosperity and social well-being depend so largely upon the possession and enjoyment of our natural endowments.

We respectfully invite the attention of this court to two public documents prepared by the United States Bureau of Fisheries in Washington, D. C. The first is Document 2000 (issued in September, 1935), I-81, entitled, "Conservation Work of the Bureau of Fisheries." We quote from page 8:

"A greater appreciation of the necessity for conserving our fisheries has undoubtedly been brought about by the serious depletion of some of the most important of them. *The sturgeon has all but disappeared from both coastal and inland waters; the salmon of the Atlantic Coast have been entirely exterminated in many streams, and in others only a small remnant of the former runs remains; in certain streams on the Pacific Coast the*

salmon are much reduced; the halibut on both coasts have been distinctly reduced in numbers, unquestionably as a result of overfishing; the shad and mullet of the east coast and the whitefishes and related forms of the Great Lakes have been affected, and the production of oysters has markedly declined.

“ * * * Except in the Territory of Alaska and with respect to the taking of sponges in the extra territorial waters of Florida, *the Bureau of Fisheries is without power to regulate fishing, for under the Federal form of government Congress exercises only such powers as are delegated under the Constitution and complete jurisdiction of the fisheries has remained in the hands of the individual states.* * * * .” (Italics ours.)

The second is Fisheries Document No. 1092, entitled, “Pacific Coast Salmon Fisheries.” We quote from page 410:

“The most valuable commercial fisheries in the world, excepting only the oyster and herring fisheries, are those supported by the salmons. Of these the most important by far are the salmon fisheries of the Pacific coast of North America, where California, Oregon, Washington, and Alaska, including also British Columbia, possess industries representing millions of dollars of investment and millions of output annually.”

For whom is the fast diminishing supply being conserved by the State of Washington through the valid exercise of its inherent police powers? Only for the white man and not for the red man? Clearly not, for the Indian is now a full-fledged citizen, who can assert any of the rights and privileges of citizenship claimed by the white man. Can the Indian citizen be allowed special privileges which are as detrimental to him in the end as they are to his fellow white citizen? In fact, through the exercise of his voting privilege, the Indian as a citizen of the state, helped to place on the statute books these protective measures, from which he is now asking freedom from re-

strait to enjoy the very fruits of their objective, while his fellow citizen is amenable thereto.

To hamper the state in the exercise of its police power in this regard by allowing the Indian citizen to escape the reasonable regulatory measures designed to maintain the supply of its fisheries would be merely to thwart the state in coping with what is recognized today as one of its greatest problems. Who would question the wisdom and right of the Federal government to erect the huge power dams as national defense measures and to give civilization as now constituted the manifold benefits to be derived from the development of hydroelectric energy? These dams are threatening the continued existence of a great natural resource, our fish, in which the Indian has a vital interest. In fact, the guardian itself is responsible for gradually destroying the ancient fishing sites of its wards along the Columbia River. The state is waging a militant conservation warfare, in the face of almost insurmountable obstacles, to prevent the ever-increasing diminution, indeed the complete extinction, of the salmon fisheries, which once made the Northwest a "happy hunting and fishing ground."

The government's interest as guardian of the Indian wards, and the state's interest in behalf of all its citizens are not, or should not be, at variance. Indeed, it should be as much the concern of the guardian national government in behalf of its Indian wards, to see that the fisheries of the commonwealth are not exhausted by uncontrolled fishing methods as it is the concern of the State of Washington. Commercial salmon fishing is here involved. If the government's wards must depend upon monetary return from commercial fishing for a livelihood,

and this cannot be accomplished by the Indians through fishing according to reasonable state regulations, using the same types of gear and given the same fishing privileges accorded the ordinary citizen, then it is in the interest of the Indian, and in the interest of the welfare of the state and nation for the guardian to give the Indians an outright subsidy. Money can be replenished through coining; fish cannot be replaced once the fish themselves are exterminated.

CONCLUSION

Upon its face, this case perhaps does not appear to be of great importance. Viewed superficially and from a sentimental standpoint, it may seem that the State of Washington is not in an equitable position when it seeks to collect license fees from the Yakima Indians who are catching salmon for a livelihood. This is negated by the benevolent acts of the Washington State Legislature which has enacted legislation permitting the Indian to fish at any time, without a license, for the consumption of himself and family in any of the salt waters bordering any Indian reservation or within one-half mile thereof, or fish with set net in any river within five miles of the borders of an Indian reservation (Chapter 31, Session Laws of the State of Washington, 1915). At the 1939 session of the legislature (Chapter 210, Laws of 1939), special fishing privileges were granted the Sokulk Band of Indians who have no reservation and are nomads, to take fish for personal use in designated fishing areas.

The case, however, is of far greater importance than disclosed by the record. This particular treaty provision is common to all the Indian treaties in the state so far

as we are able to ascertain. The net result is that these treaties, taken in concert, cover practically every *usual and accustomed place of fishing in the State of Washington*. Four Federal injunction suits are now pending in Federal District Courts in Washington to restrain the state fisheries officials from interfering with Indian commercial fishing exploitations outside the reservations. Others are being held in abeyance pending the outcome of the case at bar.

As a matter of public record, the 1930 government census showed 11,253 Indians in the State of Washington, which was an increase of 2,192 over the 1920 census. An additional 1,543 Indians were listed in 1930 as residents of Oregon, but sharing special privileges in fishing on the Columbia River. The official 1940 census figures are not yet compiled. According to the best available figures furnished by Indian agents, in 1938 there were 13,644 enrolled Indians living on reservations throughout the state, with an additional 500 (approximately) who were not enrolled in any agency.

Commercial fishing has developed upon a scale not even contemplated when the treaties were made. New and improved methods of taking fish by mechanical appliances and in enormous quantities have been perfected. The conservation of this valuable food supply has become a matter of supreme importance to the public welfare as is demonstrated by the session laws of each legislature. Many of the Indian tribes now make a business of fishing commercially. The commercial catch records of the state department of fisheries disclose that Indian fishermen take a substantial share of the food fish harvest annually. Many of the Indian fishermen operate

the most modern gear devised by the ingenuity of the white man. If the courts hold that the Indian citizens may fish unrestricted and free from control, then it must be deduced that no limitations can be placed upon the methods by which they fish.

We must not overlook the fact that the Indian citizen has grown into full stature of citizenship, and is as much a part of the body politic as any other citizen. As such, his interest in police measures adopted for the common good of all are undistinguishable. The corollary follows that the state's interest in the welfare of its Indian citizens is as great as that of any other. The proposition is tersely summarized in *Cawsey v. Brickey*, 82 Wash. 653, at page 657:

“ * * * Since the title to game is in the state for the common good, the state's right to control, regulate or prohibit the taking of game wheresoever found and on whosoever land is an inherent incident of the police power of the state. Tiedeman's Limitations of Police Power, Sec. 121f. It may be exercised *ad libitum* so long as the regulation or prohibition bears equally on all persons similarly situated with reference to the subject-matter and purpose to be served by the regulation. *Portland Fish Co. v. Benson*, 56 Ore. 147, 108 Pac. 122.”

Regardless of the relative importance or nonimportance of the case, as stressed by both the appellants and appellees, the sole issue is the extent of the police power of the State of Washington. We respectfully submit, as a matter of law, that the Stevens Treaty of 1855 vouchsafed to the Makah Tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there to fish in common with all citizens of the United States; that the Enabling Act admitted

Washington into the Union invested with all the powers inherent to a sovereign state, including the right to regulate its internal affairs for the welfare of its citizens; that, accordingly, the fishing right granted by the treaty is subject to the paramount and superior right of the state under the exercise of its sovereign police power to regulate the taking of fish from the waters within its jurisdiction; that Congress in 1924 granted the Indian full citizenship, and the Indian citizen can now fish in common and on a parity with the citizens of this commonwealth; and that therefore the judgment of the District Court should be reversed and the permanent injunction dissolved.

Respectfully submitted,

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**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

B. T. McCAULEY, Director of Game of the
State of Washington, B. M. BRENNAN,
Director of Fisheries of the State of
Washington, E. M. BENN, Inspector of
the Department of Fisheries of the State
of Washington, and GUY BURNHAM,
Game Protector of the State of Wash-
ington, *Appellants,*

vs.

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY MC-
CARTHY and HAROLD IDES, individually
and members of the Council of the Ma-
kah Indian Tribe, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

VANDERVEER, BASSETT & GEISNESS,
Attorneys for Appellees.

1311 Alaska Building,
Seattle, Washington.

FILED

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PAUL P. O'BRIEN,

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BRIEF OF APPELLEES

STATEMENT AS TO JURISDICTION

The Bill of Complaint filed by the appellees (Tr. 1 to 19 inc.) asserts that the defendants are interfering with rights possessed by the appellees under a treaty, copy of which is attached to the Complaint (Tr. 13 to 19 inc.). The pertinent provision of the treaty (12 Statutes 939) is as follows:

“The right of taking fish and of whaling or

sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * *."

It is alleged in the Complaint that the value of the right in controversy exceeds \$3000.00 (Tr. 8) and this allegation is admitted in paragraph II of the Answer. (Tr. 27).

Jurisdiction of the United States District Court rests upon Art. III, Sec. 2, Cl. 1, of the United States Constitution and 28 U.S.C.A. Sec. 41(1).

STATEMENT OF THE CASE

The appellees, the Makah Indian Tribe and the members of the Tribal Council, sued to prevent interference with the exercise of privileges asserted by virtue of a treaty between the tribe and the United States of America. In substance the following facts are alleged in the Bill of Complaint:

By a treaty made January 31, 1855, the Makah Indians ceded all lands occupied by them, including, of course, their fishing places, to the United States Government. The treaty reserved a certain area for the Indians and also promised and secured to the Indians and to their posterity and successors the right of taking fish at usual and accustomed grounds and stations. From time immemorial the Makah Indians have been accustomed to fish in the Hoko River from its mouth up to its spawning grounds. The Makahs ceded the Hoko River to the United States Government and it is not part of the reservation, but both the reserva-

tion and the river are in the northwest portion of Clallam County, Washington.

By virtue of the guarantee contained in the treaty, the Makah Indians fished in the Hoko River with specified Indian gear until stopped by the appellants. In violation of the rights secured to the appellees by the treaty, the appellants, who are officers and employees of the State of Washington, threatened to arrest and confiscate the fishing gear of any Makah Indians fishing in the Hoko River and have intentionally prevented any fishing by the Makah Indians in any part of the Hoko River.

From the time of the treaty until about 1933 the State of Washington and its agents and employees recognized and acquiesced in the fishing rights claimed by the appellees, and the members of the Makah Indian Tribe continuously exercised them without interference. The appellees prayed that the treaty rights be established and declared by the Court and that injunctive relief be granted.

After answering, the appellants move for judgment upon the pleadings. A three-judge statutory court disclaimed jurisdiction, an inescapable conclusion under *Beard Truck Line Co. v. Smith*, 12 F. Supp. 964 (D.C. Tex. 1935), and *Ex parte Bransfor*, 310 U. S. 354, 84 L. ed. 1249. The appellees at no time requested that a statutory court be convened and, on the contrary, contended that such a court would not have jurisdiction, but it was stipulated, as in *Beard Truck Line Co. v. Smith*, *supra*, that the motion for judgment on the pleadings might be determined by a statutory court and that if such court should find

that it lacked jurisdiction the motion might be determined and disposed of by a single district judge without further hearing. Pursuant to this stipulation the motion was thereupon submitted to Judge Bowen who made a written memorandum decision favorable to the appellees found on pp. 35 to 43 of the Transcript of Record.

After reciting that "it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause and evidence was adduced in support of the allegations in the Bill of Complaint, without objections from the defendants" (Tr. 44), the Court made Findings of Fact, Conclusions of Law and a Decree. The Findings of Fact follow the allegations of the Complaint and the Decree accords the relief prayed for by the appellees.

Aside from questions pertaining to jurisdiction, three basic questions are presented:

(1) What is the meaning of Article IV of the Treaty which reads:

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States * * *."

Does this language mean that the Indians have an absolute right to fish although the Whites may share the privilege, or does it mean that the right of the Indians to fish may be restricted or taken away alto-

gether if a like limitation is imposed upon fishing by the Whites?

(2) If the Treaty be interpreted as attempting to reserve a right which the State may not take away even in the exercise of its police power, is the Treaty provision invalid as an improper impairment of State sovereignty or because it places the State upon an unequal footing with the original states?

(3) Have the Indians lost rights they previously had under the treaty provision in question, by reason of the grant to them of United States citizenship?

The appellees do not deny that the appellants assume to act under state statutes.

SUMMARY OF ARGUMENT

Jurisdiction

(1) This action is not one against the State. It is an action to enjoin conduct violative of the supreme law of the land, although the actors against whom relief is sought are state officers.

(2) It is immaterial to jurisdiction that the appellees are citizens.

(3) While the United States Attorney may act on behalf of the Indians, they are not disabled from bringing an action in their own behalf by their own counsel.

ON THE MERITS

(1) The treaty should be interpreted as the Indians understood it. It means that the Indians have an absolute right to fish, although the privilege may be shared by the Whites, and the State, in the exercise

of the police power, may not prevent the exercise of that right. If the Treaty is ambiguous, the Court is bound to the interpretation advanced by the appellees, due to the manner in which the case has come to this Court.

(2) The Treaty was a proper exercise of the treaty making power. Such a treaty is the supreme law of the land. Inconsistent state enactments, although in the exercise of the police power, are invalid. This is true of all states and the treaty in question does not therefore place the State of Washington upon an unequal footing.

The State cannot abrogate a treaty of the United States government to effectuate its conservation policies.

(3) No fishing rights were divested by granting citizenship to the Indians.

ARGUMENT AS TO JURISDICTION

I.

The Action Is Not One Against the State of Washington

It is contended that the United States District Court lacked jurisdiction because the suit is one against the State of Washington. In fact, the suit is against persons who are officers of the State of Washington and seeks to enjoin conduct, violative of rights under a treaty of the United States of America, which the State of Washington has no power to authorize and legalize. It is now well established that such a suit is not a suit against the state in such a sense as to

deprive the federal courts of jurisdiction otherwise possessed.

Hughes Fed. Pro., Sec. 3036, p. 219;

Cyc. of Fed. Pro., Sec. 27, p. 99;

107 Foster Fed. Proc. (6th ed.) Sec. 105c,
p. 664;

Pennoyer v. McConnaughy, 140 U.S. 1, 10,
35 L. ed. 353;

Ex parte Young, 209 U.S. 123, 52 L. ed. 714;

Tindal v. Wesley, 167 U.S. 204, 219-220, 42
L. ed. 137;

Prout v. Starr, 188 U.S. 537, 543, 47 L. ed.
584;

Scott v. Donald, 165 U.S. 58, 41 L. ed. 632;

Smyth v. Ames, 169 U.S. 466, 42 L. ed. 819.

Under the foregoing authorities, a suit against a state officer is not a suit against the state merely because the state officers acted under color of their office or under a purported but invalid authority from the state—specifically an authority invalid because in conflict with the Constitution of the United States or statutes or treaties made thereunder.

In U. S. C. Ann., Constitution, part 2, paragraph 56, a multitude of cases are assembled and the rule is accurately stated by the editors:

“A suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of this (the Eleventh) amendment.”

Likewise a Federal Court of equity may enjoin uncon-

stitutional action taken by a duly constituted state commission under a constitutional statute. *Greene v. Louisville and Interurban Railroad Co.*, 244 U. S. 499, 61 L. ed. 1280. At p. 1285 of the L. ed. report the controlling rules are stated:

“A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the State of Kentucky, are in effect suits against the state. Questions of this sort have arisen many times in this court but the matter was set at rest in *Ex parte Young*, 209 U. S. 123, 150, 155, 52 L. ed. 714, 725, 727, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was held that a suit to restrain a state officer from executing an unconstitutional statute, in violation of the plaintiff’s rights and to his irreparable damage, is not a suit against the state and that ‘individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the law of the state, and who threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the Federal Constitution may be enjoined by a Federal court of equity from such action.’

“In repeated decisions since *ex parte Young*, that case has been recognized as setting these cases at rest. (citing cases)

“The principle is not confined to the maintenance of suits for restraining the enforcement of statutes, which, as enacted by the state legislature, are in themselves unconstitutional. *Reagan v. Farmers Loan & T. Co.*, 154 U. S. 362, 390, 38

L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but a confiscatory, and therefore unconstitutional action taken by a state commission under a constitutional statute.”

II.

The Citizenship of Appellees Does Not Affect Jurisdiction

Suit by the appellees against the State of Washington to enforce a state liability could not be entertained by the Federal courts, whatever their citizenship. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842. The citizenship of the appellees seems immaterial.

III.

The Plaintiffs Have Capacity to Sue

It is true, as argued by the appellants, that the United States District Attorney may bring an action on behalf of Indians. On the other hand, Indians have undoubted capacity to sue on their own behalf by their own counsel. In fact, the very statute under which the plaintiff tribal corporation is organized (25 U.S.C.A. Supp. Sec. 475, 48 Stat. 987) specifically authorizes the employment of legal counsel by the tribe. There can, however, be no serious doubt as to the capacity of the individual appellees to bring this action on their own behalf by their own counsel.

Sampson v. Brennan, 39 F. Supp. 74;

Deere v. New York, 22 F. (2d) 851;

Lane v. Santa Rosa, 249 U. S. 110, 63 L. ed. 504;

Y-ta-tah-wah v. Rebeck, 105 Fed. 257.

ARGUMENT ON THE MERITS

In both divisions of the Western District of Washington other actions have been brought by Indian tribes presenting precisely the same issues as presented in this case. In each case the decision of the court has been favorable to the Indians upon all points. In 1937 members of the Nisqually Tribe of Indians brought such an action entitled "*Chief Peter Kalama, et al., v. Brennan, et al.*, Cause No. 598" in the Western District of Washington, Southern Division and Judge Cushman overruled a motion to dismiss and issued a preliminary injunction. Thereafter, in 1939, in *Sampson v. Brennan*, 39 F. Supp. 74, Judge Bowen, in the Northern Division of the Western District of Washington, wrote the following opinion:

"This is an action against state officers for relief from their alleged unlawful acts under state laws asserted to be invalid because in conflict with plaintiffs' Indian fishing rights under an Indian treaty with the United States. The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh Amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 S. Ct. 699, 35 L. ed. 363; *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764; *Ex parte New York*, 256 U. S. 490, 500, 41 S. Ct. 588, 65 L. ed. 1057. Plaintiff Indians being citizens of the United States, 8 U.S.C.A. Sec. 3, may as other citizens employ counsel of their own choice. They may also in federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States.

Deere v. New York, D.C., 22 F. (2d) 851. The motion to dismiss will be denied.

“In view of the rulings by Judge Cushman of this court in *Mason v. Sams*, 5 F. (2d) 255, and in *Chief Peter Kalama, et al., v. Brennan, et al.*, Cause No. 598, Western District of Washington, Southern Division, order of November 3, 1937, plaintiffs’ motion for temporary injunction herein will be granted. Plaintiffs’ allegation of requisite jurisdictional amount is not controverted.”

Both of the foregoing cases present identically the same issues as the one now before the court.

We have already referred the attention of the Court to the well considered opinion of Judge Bowen in the instant case.

In the following arguments addressed to the merits we propose to maintain the important distinction between the construction of the treaty, on the one hand, and, on the other, the asserted police power of the state to prohibit fishing no matter what the meaning of the treaty. We will argue those questions separately. It is our impression that the appellants’ argument does not at all times observe this distinction and that there is some resulting confusion to the reader.

I.

Construction of the Treaty

The appellees charge in their complaint that the appellants have altogether prevented the exercise by them of their treaty rights to fish in the Hoko River. *We are not now concerned with the power of the state to impose some type of regulation.* Whatever power it may have to regulate the exercise of the fishing

rights, may it go further and altogether prevent their exercise?

Laying aside for the moment all questions concerning the power of the state to divest the Indians of treaty rights, a question which, as we have already indicated, will be separately discussed, we submit that the treaty properly construed does not mean merely that the Indians can fish until the local government of the Whites divests them of the right. The true meaning of the treaty surely was that the Indians reserved their fishing privileges, reserved the right to continue fishing as they always had in the past, although it was understood, too, that the Whites might also fish in the same places.

The general principles governing the construction of treaties are stated by the Supreme Court in *Nielsen v. Johnson* (1929) 279 U. S. 47, 73 L. ed. 607, 49 S. Ct. 223, and provide a significant background for consideration of the treaty here before the Court:

“Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U. S. 123; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker v. Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U. S. 332; *Tucker v. Alexandroff*, *supra*; *Geofroy v. Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so con-

strued is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568; *Jordan v. Tashiro*, *supra*, *cf. Cheung Sum Shee v. Nagle*, 268 U. S. 336, 69 L. ed. 985, 45 Sup. Ct. Rep. 539. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it."

In addition to the foregoing rules of construction applicable to treaties in general, it is well established that treaties with Indian tribes are to be interpreted with a peculiar liberality to carry into effect the meaning given to the treaty by the Indians themselves. In *Seufert Brothers Company v. United States*, 249 U. S. 194, 63 L. ed. 555, 39 S. Ct. 203, the court quoted from *U. S. v. Winans*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089:

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by superior justice which looks only to the substance of the right, without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

See also:

U. S. v. Shoshone Tribe of Indians (1938)
304 U.S. 111, 82 L. ed. 1213;

U. S. ex rel. Marks v. Brooks (D. C. Ind.
1940) 32 F. Supp. 422;

Jones v. Meehan, 175 U.S. 1, 20 S. Ct. 1, 44 L. ed. 491.

In the light of the foregoing principles, the circumstances under which the treaty was executed, the negotiations leading up to it and the subsequent interpretation placed upon the treaty are overwhelmingly persuasive.

In connection with this argument it should be borne in mind that factual questions are not before the court. Appellants' motion for judgment upon the pleadings admitted all facts alleged by the appellees. *Wyman v. Wyman* (C.C.A. 9th 1940) 109 F. (2d) 473. And the recitation of the District Court in the introductory part of the Findings of Fact and Conclusions of Law, repeated in the like part of the Decree, makes clear that appellees' construction of the treaty, a question of fact if the language is ambiguous, must be adopted, unless the Court can say that as a matter of law the treaty upon its face means something different. The facts we will mention are for the most part admitted or of general knowledge and in any event give point to our argument that the treaty should not be interpreted against our contentions as a matter of law.

The Makah Indians and the other groups living on the Western part of the Olympic Peninsula were almost exclusively dependent upon fish for their livelihood. In negotiating the treaty with the Federal Government the Indians were not primarily concerned with land; land was not used by them as a source of livelihood, but merely provided them with living quarters and a place to dry their fish. It was essential to them that they continue fishing as in the past. They

could survive no matter what the quality or area of the land reserved to them, but there was no prospect of survival by their own efforts if their fishing rights at usual and accustomed places were substantially impaired. These circumstances are reflected in conversations occurring during the negotiation of the treaty, a summary of which Judge Bowen incorporated in his opinion:

“On January 30, 1855, in the proceedings leading up to the above-mentioned treaty, Kalchote of Neah Bay said that he thought he ought to have right to fish and take whale and get food where he liked. Keh-Tehook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing.”

At the time the treaty was made the Act of Congress establishing the territory of Washington had been in effect less than two years. A period of almost thirty-five years was to elapse before the organization of the State of Washington. The Makahs lived in the extreme northwesterly tip of the state, a region which is still comparatively isolated. It is inconceivable that they had the slightest conception of either state or territorial sovereignty or that they were even aware of the existence of a territorial government.

They said to Governor Stevens, in substance, that they were not concerned with keeping their land, although they wanted to stay on the salt water, but that they did want to continue fishing. He, in turn, assured them he did not wish to stop their fishing but, on the contrary, wished to assist them by furnishing apparatus.

The treaty is to be construed liberally and as the Indians understood it. The white men now say that the State of Washington is a sovereign state, although completely unknown to the Indians at the time the treaty was made, and that it possesses police power, and that it is perfectly consistent with the treaty to take away the Indian's treasured right to fish, by virtue of that power. We respectfully submit that such an interpretation of the treaty does violence to the Indians' understanding of the right conferred.

In his opinion in this case Judge Bowen emphasized the fact that the fishing rights were not *granted* to the Indians by the treaty but were instead reserved to them, and it has been so held in other cases. *U. S. v. Winans*, 198 U.S. 371, 381 S. Ct. 662, 492 L. ed. 1089; *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 244 Pac. 557. The Indians enjoyed the right to fish in usual and accustomed places when the treaty was made. The language of the treaty is not in terms a grant of fishing rights but provides that such rights are "further secured to the Indians." The purpose was to reserve inviolate existing rights. It could hardly be said that those rights would be preserved inviolate if the state did not permit them to be exercised at all. The police power of the state cannot properly be ap-

plied to a right which was never acquired by the state or nation but, on the contrary, was specifically reserved to the Indians by treaty.

The appellants rely strongly upon *Ward v. Race Horse*, 163 U.S. 504, 41 L. ed. 244, 16 S. Ct. 1076, and *State ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L. ed. 1166, 36 S. Ct. 705. We believe that both of those cases, critically read, support our position.

In *Ward v. Race Horse*, the treaty in question provided that the Indians should "have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the Whites and Indians on the borders of the hunting districts." The Court emphasized that the right to hunt thus promised to the Indians was dependent upon the continuity of certain conditions, vacancy of the lands and existence of peace. The rights were described as "essentially perishable and intended to be of limited duration." The Court said:

"The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right dependent upon whether the land in the hunting districts was unoccupied public land of the United States. This, as we have said, left the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with title to the land in the hunting districts."

The Court so construed the treaty that the rights conferred were terminated by the enabling act by

authority of which the State of Wyoming was admitted into the Union. The Court makes it clear that its opinion applies only to rights of a similar conditional and perishable nature, and it concedes, for the sake of argument, *“that where there are rights created by Congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the subsequent purpose of Congress to continue them in the state, after its admission, such continuation will, as a matter of construction be upheld, although the Enabling Act does not expressly so direct.”*

Continuing, the Court said:

“Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that, although by the treaty the hunting was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue, although the United States parted with its entire authority over the capture and killing of game.”

There is certainly a strong implication at least that rights which are not “essentially perishable and intended to be of a limited duration” but which, like the Makahs’, are permanently reserved, cannot be destroyed by the state.

The appellants also argue from this case that the Enabling Act by virtue of which the State of Washington was formed abridged the treaty, insofar as the treaty restricts state regulation of Indian fishing and that the treaty must give way before the police power of the state. These points will be separately discussed. We are now considering the *Race Horse* case only so far as it bears upon treaty interpretation and it can readily be seen that it strongly supports the appellees in that regard.

State ex rel. Kennedy v. Becker, 241 U. S. 556, 36 S. Ct. 705, 60 L. ed. 1166, arose out of a treaty made by Robert Morris, or by the Government on his behalf, with the Seneca Tribe, under which the tribe granted certain lands to him, excepting from the grant "the privilege of fishing and hunting on said tract of land hereby intended to be conveyed." The privilege applied to the whole immense tract and was not confined to usual and accustomed places. The right itself was one which might well have been construed as temporary, applying, as it did, to the whole area in question, and was, as the court said, irreconcilable with state sovereignty. So far as appears, the right was never sanctioned by continued usage or by state recognition or acquiescence. But the Court's construction of the treaty, permitting the state to exercise its police power, rests primarily upon another factor. The court said that the modern fish and game regulations were not within the contemplation of the parties, "*but the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty whether*

fully appreciated or not." At the time of the treaty, 1797, the Seneca Indians were entirely familiar with the sovereignty of the State of New York. It had existed as a state for twenty years and there had been an organized, well-established government for well over a century before that. The Supreme Court found, in substance, that the Senecas were aware of that sovereignty, and, in the light of the circumstances and the nature of the blanket privilege, must have understood that such privilege was subject to the sovereign power of the state. In the instant case, such an implication would be preposterous.

It is of no significance that the Indians did or did not appreciate the sovereign power of the United States Government. It must be conceded that the United States Government may impair the treaty rights, if it chooses, although as stated by Justice Brown in a dissenting opinion in the *Race Horse* case, the abrogation of a public treaty ought not to be inferred from doubtful language, but the intention of Congress to repudiate it ought clearly to appear. We are here concerned with the power of the *state* and the question is whether the Indians understood that their right to fish was subject to the sovereign power of the state. However, only by recourse to fancy can it be conceived that the Indians understood that the United States Government itself could, without violence to the treaty, abrogate the fishing rights in question, in the name of conservation. (In fact, it is most probable that the Makahs had no conception at all of sovereignty as we understand it. The tribe itself was notable for its lack of any organized govern-

ment and for its existence without governmental authority. Governor Stevens announced that he was acting for the "Great Father," so we may judge that the Makahs' conception of his principal was embraced in that term.)

In considering the meaning of this treaty, we must keep before us the rule that the treaty is to be interpreted as the Indians understood it. What did they understand by the provisions in question? They unquestionably understood that they were to have the *right to fish*, although the Whites could fish in the same places. They certainly did not understand that they were to have the right to fish with the Whites *unless* the Whites decided that neither Indians or Whites should fish in those places. There is nothing in the phrase "in common with all citizens of the United States," implying that the fishing right could be abrogated by a future state government. It meant to the Indians that they would have the right to fish, together with the Whites. To them, it was an unconditional right. They were induced to sign the treaty on the basis of that understanding. We submit that it is not only inconsistent with the established principles governing treaty construction, to which we have referred, but a plain moral outrage to permit the State of Washington to say to the Indians that there was a radical limitation upon the right, of which the Makahs must have been fully aware, because they could scarcely have thought in terms of a "dual sovereignty" over the accustomed fishing places and must have understood that a territorial government was being organized and that a state eventually would come

into being, possessing the essential attributes of sovereignty. Obviously, the Indians did not think of those things, and even if they had any concept of "sovereignty" at all, it could not have been a concept of state sovereignty. The substance of it clearly was that they wanted to fish where they had fished and they thought they were getting that right *as against the whites*, although in common with them.

We wish to emphasize that we are not now concerned with the authority of the state, under the treaty, to promulgate some kind of regulations effective over the Indians; we are concerned with the right of the state to take away the fishing privilege and we contend that any reasoning that reaches such a result is simply a legalistic justification for breach of a solemn promise as Judge Mackintosh (in *State v. Meninock*, 115 Wash. 528, 197 Pac. 641) said in a dissenting opinion:

"MACKINTOSH, J. (dissenting). No argument based upon the theory that the State has a right, in exercising the protection of its game and fish, to violate a solemn treaty made with Indian tribes, can receive the sanction of my conscience or my reason. I am unalterably of the opinion that the decision of this court in the *Towessnute* case is incorrect, and that the majority opinion in the instant case, following that decision, is wrong.

"I have no patience with the violation of plain treaty provisions based in fact upon the strength of the violator and the weakness of the violated, but supported in theory by ingenious reasons and excuses. Such conduct is more fittingly engaged in by Hun than by the civilized.

“My inclination would be to go more extensively into an argument on this question were it not for the fact that the Legislature of this State, in session in the present year passed an act (Chapter 58, Session Laws 1921) recognizing the injustice of the *Towessnute* decision and seeking to keep faith with the Yakima Nation. I content myself, therefore, with merely dissenting from the majority opinion.”

It is true that in *U. S. v. Winans, etc.*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089, the court, referring to a treaty similar to the one at bar, said,

“* * * nor does it restrain the state unreasonably if at all, in the regulation of the right.”

The statement is *dicta* because the case involved merely the right of the Indians as against a private individual who had acquired title to the fishing place and was licensed by the state to erect a fish wheel which made it impossible for the Indians to fish, and the Court upheld the Indians as against the individual. The circumstances surrounding the negotiation of the treaty were not discussed and the case surely can not be considered a decision by the Court that the treaty at bar does not restrain the state in the regulation of the fishing right. But, in any event, the Court does not by any means convey the idea that the state might altogether abrogate the right of the Indians. In fact, in another part of the opinion, the reasoning would indicate that the Court had the contrary thought in mind. In discussing a contention that the treaty provision only allowed the Indians to fish in common with the Whites, that the white men and the Indians might, according to their different

capacities, devise and make use of instrumentalities to enjoy the common right and that the means devised by the white men, the fish wheel, is simply such a device used by the white men in the enjoyment of the common right, the Court said:

“But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over an ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides the fish wheel is not relied upon alone. Its monopoly is made complete by a license from the state. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.”

If the language of the treaty means only that the state may take away the right and no other interpretation is permissible, it is apparent that the United States Supreme Court in the *Race Horse* case would not have discussed the precarious and perishable nature of the rights granted, nor in *Kennedy v. Becker* would it have discussed the Indians' knowledge of state sovereignty at the time the treaty was made. Such considerations would be quite immaterial.

The appellants refer to a series of decisions by the Supreme Court of the State of Washington. A ma-

jority of the state court have consistently ruled against the Indians in cases in which the state regulated rights secured by treaty. The result has been reached by a divided court and there have been very vigorous dissents, one of which we have already quoted in part. The last decision, *State of Washington v. Tulee*, 7 Wn.(2d) 124, 109 P.(2d) 280, found five judges favoring the majority decision and three judges dissenting. The ninth judge did not participate, presumably because he had previously represented the Indians in the same case while U. S. District Attorney. In a dissenting opinion, Judge Simpson said, after referring to statements made by Governor Stevens in negotiating the treaty:

“All of these statements were made in good faith by Governor Stevens at a time when the northwest was very much of a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the federal or territorial governments. Regulations of fish and game were neither known nor dreamed of. The Indians had from time immemorial fished for salmon on the banks of the Columbia river. The catching of salmon was necessary for the sustenance of themselves and their families. Neither Governor Stevens nor the Indian Chiefs could possibly have visualized the present day conditions and present day restrictions. They entered into the treaty agreement under situations which existed at that time. We should interpret and construe the treaty and the rights of appellant in the light of the surroundings present at that time.

“Without any doubt whatever, Governor Stev-

ens and the Indians signed the treaty with the definite understanding that the Indians should be forever allowed to catch salmon from the Columbia river without any restrictions whatsoever. We should so construe the treaty.

"It may be conceded that there is an ambiguity contained in the treaty. However, that ambiguity, if there is one, should be resolved in favor of the Indians. *Winters v. United States*, 207 U.S. 564.

"The state is not in a position, nor does it have the power, to modify or abrogate a treaty made by authority of the Congress of the United States."

It is important in considering the decisions of the state court to note that the majority have not arrived at their conclusion on the basis of construing the treaty but have held instead that regardless of what the treaty meant to the contracting parties at the time it was made the state has power to regulate Indian fishing. These cases cannot, therefore, be taken as supporting the appellants in their contentions as to the *meaning* of the treaty.

The appellants also refer to a series of old decisions by the Federal Court in this district, including *The James G. Swan*, 50 Fed. 108; *U. S. v. Winans*, 73 Fed. 72, and *U. S. v. Alaska Packers*, 79 Fed. 152. In *U. S. v. Alaska Packers* the Court said:

"In decisions heretofore rendered, both for and against the government, I have given the same interpretation to similar treaties with other tribes of Indians in Washington Territory. *U. S. v. The James G. Swan*, 50 Fed. 108; *U. S. v. Winans*, 73 Fed. 72. Up to the present time these decisions stand unreversed."

Subsequently, *U. S. v. Winans* was reversed by the United States Supreme Court in the decision to which we have referred, so the cited cases have little or no value as authorities.

II.

Supremacy of the Treaty

For a period of about a hundred years the United States Government dealt with the Indians by means of treaties. The Indian Tribes were not considered foreign states or states of the United States within the provision of the Constitution governing the judicial power but in a certain domestic sense and for certain municipal purposes they have been treated as states. *Holden v. Joy*, 17 Wall. 211, 21 L. ed. 523, 533. In 1871 this policy was terminated by a statute (25 U.S.C.A. Sec. 77, R.S. 2079) reading as follows:

“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.”

Prior to the enactment of this statute, the power of the Government to make treaties with Indian tribes was coextensive with the power to make treaties with foreign nations. *U. S. v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 197, 23 L. ed. 846.

Article VI, Clause 2 of the Constitution of the United States is specific:

“This Constitution, and the Laws of the United

States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

A treaty, whether or not with Indians, is supreme over state statutes.

Fellows v. Denniston (1861) 23 N.Y. 427, reversed on other grounds (1867) 5 Wall. 761, 18 L. ed. 708;

Worcester v. Georgia (1832) 6 Peters 515, 8 L. ed. 483;

Todak v. United State Bank of Howard (1930) 281 U.S. 449, 74 L. ed. 956;

U. S. v. City of Salamanca (D.C. N.Y. 1939) 27 F. Supp. 541;

27 Am. Jur. 538, Sec. 10.

The appellants contend that the state may take away the fishing rights in the exercise of the police power. It is well established, however, that the state cannot, even in the exercise of its police power, curtail treaty rights. In 63 C.J. p. 844, Sec. 27, the rule is stated:

“A treaty must be regarded as a part of the law of a state as much as are the state’s own local laws and constitution, and is effective and binding on the state legislature. So a treaty may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state; and the treaty-making power is superior to the reserved powers of the state, including the police power, provided the subject matter of the treaty

is not arbitrary and disconnected and remote from international intercourse."

In *Missouri v. Holland*, 252 U.S. 416, 64 L. ed. 641, affirming *U. S. v. Samples*, 258 Fed. 479, there was involved a conflict between state statutes regulating the hunting of birds and an Act of Congress giving effect to a treaty between the United States and Great Britain. The specific contention was made that the state's police power could not be limited by reason of a treaty between the United States Government and another nation. As digested by the editors of Law Edition the argument ran:

"The treaty-making power of the national government is limited by other provisions of the Constitution, including the Tenth Amendment. It cannot, therefore, divest a state of its police power or take away its ownership or control of the wild game. (Citing *Ward v. Race Horse* and other cases)"

The Court held that the treaty was supreme over the state hunting laws. The Court stated that it was not meant to imply that there were no qualifications to the treaty-making power and went on to discuss the appropriateness of the treaty power to the subject matter there at hand. On that point there can be no serious contention made that the treaty in the instant case was not a proper exercise of the treaty-making power of the United States Government. *Holden v. Joy*, *supra*, *United States v. Forty-three Gallons of Whiskey*, *supra*.

The appellants contend that the Enabling Act took away the rights possessed by the Indians as against the police power of the state. The majority in *State v.*

Tulee, 7 Wn. (2d) 124, reached a like conclusion, based upon *Ward v. Race Horse*. There is language in the *Race Horse* case that suggests that the Enabling Act might have such an operation but the Court could not have intended to so hold. If it had, there would have been no point in saying more, because the question would then have been decided. The Court, on the contrary, discussed at great length the perishable and temporary nature of the right there granted to the Indians and reached a conclusion that the treaty properly construed did not give a permanent privilege or one that could not be curtailed by the state. When we consider that all states are subject to treaties in a like manner, there is surely little substance to the argument that abridgment of the police power by a treaty is inconsistent with state sovereignty and that a state is not accepted into the Union on an equal footing if its statutes are inferior to an existing treaty. In fact, such an argument ignores the foundation scheme of our system under which sovereign powers are divided between state and federal governments.

A similar contention was considered in *Dick v. United States*, 208 U.S. 340, 52 L. ed. 520. In that case the treaty ceding lands of the Nez Perce Indians to the United States Government contained a provision that the federal laws prohibiting the introduction of intoxicating liquors into Indian country should apply to the ceded lands for a period of twenty-five years. The Court sustained this provision and held that the federal laws were applicable within the area despite the sovereignty of the State of Idaho. The

Court said that this requirement of the treaty "was not inconsistent, in any substantial sense, with the constitutional principle that a new state comes into the Union upon entire equality with the original states."

In *U. S. v. 43 Gallons of Whiskey, supra*, the Court likewise held that Congress possessed power to exclude spirituous liquors, not only from existing Indian country, but from that which was ceded to the United States and that the exclusion might be effected by a provision in a treaty ceding the territory. The Court said:

"This stipulation was not only a reasonable one to which the contracting parties had the right to agree, but was due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that federal jurisdiction must be the same, under the same circumstances, in every State, has not been departed from in this case, for the prohibition does not rest on any ground which makes a distinction between the States, and the fact that the ceded territory is within the limits of Minnesota is a mere incident and not the foundation of the prohibition."

It is difficult to determine the exact ground upon which the majority opinion in the *Race Horse* case is based. It is perhaps enough for our present purpose that the decision by very specific pronouncement of the Court can apply only to cases in which the treaty in question confers a temporary and precarious right. The Court evidently proceeded in part upon the theory

also that creation of the state rendered the lands *occupied* within the meaning of the treaty and thereby ended their hunting rights. Justice Brown indicates in his dissenting opinion that he understands the majority to rest their decision, in part, upon this theory. In any event, the result is made to depend upon the existence of a circumstance, the temporary and uncertain nature of the privilege, exactly the reverse of what we have here.

So far as the *Race Horse* case may be taken to hold that no treaty of the United States may abridge the police power of the state it must be considered overruled by *Missouri v. Holland*, 252 U.S. 416, 64 L. ed. 641. Likewise, the decision in *Missouri v. Holland* does not permit the contention, also founded upon the *Race Horse* case, that any restriction of state regulation of hunting and fishing within its boundaries is inconsistent with the existence of that police power possessed by all the states. Finally, in view of the foregoing, there is nothing left to the argument that the Enabling Act abridged the treaty, or at least gave the state power to abridge the treaty, because all reasons given in support of such a conclusion are gone, all states being equally subject to the supremacy of treaties.

Thus, it will be seen that if the treaty means what we, in the first part of our argument upon the merits, urge that it means, the fishing right cannot be taken away by state laws even though enacted in the exercise of police power.

Even if it were true, and it is in fact vigorously

denied, that the Indians are an important factor in the depletion of fish, the state may not protect that interest, however vital, by overriding a treaty. The United States Government alone possesses that power.

III.

The Grant of Citizenship to the Indians Has Not Affected Their Treaty Rights.

It is argued that the rights of the Indians under the treaty provision in question were abrogated by the grant to the Indians (in 1924) of citizenship. Such a conclusion runs counter to the principle previously mentioned that an Act of Congress is not to be deemed an abrogation of a treaty unless such an intention is clearly expressed. Furthermore, the grant of citizenship does not by any means imply a loss of rights. It was intended as a grant of a privilege, intended to confer rights and privileges, not take them away.

In *Mason v. Sams* (D.C. Wash. 1925) 5 F.(2d) 255, Judge Cushman said:

“These Indians have been, by the Act of June 2, 1924 (42 Stat. at large 1923-1924, part 1, page 253c. 233), made citizens of the United States with this proviso:

“That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.’

“Under the rule favoring the Indians in the interpretation of treaties and laws effecting them, already alluded to, any fishing rights of plaintiff under the treaty are preserved by this proviso.”

Finally, as stated by the appellants in their brief,

the Indian is in the novel position of dual citizenship. He remains a member of a tribe and a ward of the United States Government. The statement of Mr. Justice Vandevanter in *United States v. Nice*, 241 U.S. 591, 60 L. ed. 1192, quoted by the appellants, is definite:

“Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relations may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.”

In *U. S. v. City of Salamanca* (D.C. N.Y. 1939) 27 F. Supp. 541, the Court in determining the right of the United States to sue on behalf of Indians, reviewed the history of the relation between the United States and the Indians, described the status of the Indians as separate communities and as wards of the United States and said:

“The allotment did not dissolve the tribal relation, *U. S. v. Nice*, 241, U.S. 591, 60 L. ed. 1192, 36 S. Ct. 696, nor has the granting of citizenship terminated this status, *U. S. v. Boylan*, *supra*.”

The Court concluded that the United States could maintain the action on behalf of the Indians.

Nor is the guardianship of the United States terminated by grant of state citizenship and state political rights.

U. S. v. Dewey County (S.D. 1926) 14 F. (2d) 784; Affirmed (C.C.A. 1928) 26 F. (2d) 434.

For our purposes, the Indians stand in no different position than previously. During the period that the treaty in question was made Indian tribes were not considered as foreign nations.

United States v. Kagama, 118 U.S. 375, 30 L. ed. 228.

In the case just mentioned the Court said:

"Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S. Bk. 8, L. ed. 25), and in the case of *Worcester v. Georgia*, 6 Pet. 536 (31 U.S. bk. 8, L. ed. 492). These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin in the former is a very valuable *resume* of the treaties and statutes concerning the Indian Tribes previous to and during the confederation.

"In the first of the above cases it was held that these Tribes were neither States nor Nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend

her laws and the jurisdiction of her courts over them.

“In the opinions in these cases they are spoken of as ‘wards of the Nation,’ ‘pupils,’ as local independent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes:

“‘No Indian Nation or Tribe, within the territory of the United States, shall be acknowledged, or recognized as an independent Nation, Tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired.’”

As an original proposition it might be doubted that a treaty could be made with an Indian tribe, its status being as above described. However, the cases we have already mentioned establish beyond any doubt the power of the United States to deal with the Indian tribes by treaty as well as by legislation.

The substance of the matter is that the Indians are subject to complete control by the Government of the United States. As held in the *Kagama* case, *supra*, this control is not limited to that granted in the commerce clause and it is not derived from any specific provision in the United States Constitution, but it is a plenary authority. It can be exercised by treaty or

by statute, and since 1871 the latter method has been exclusively employed. The Act of 1871, changing the method of regulating the Indians, specifically preserved all existing treaties. No matter what their degree of independence, nor whether they are citizens or not, the Indians remain wards of the Government, their status being unchanged. Any provision of treaty or Federal statute governing the Indians is supreme over state law. Their citizenship is, therefore, qualified by the rule that they are wards of the United States Government and by treaties and statutes executing the guardianship.

Thus, it is certain that there is no necessary inconsistency between the vesting of citizenship and preservation of a certain immunity from state police power. A repeal by implication cannot, therefore, arise under the well established rule "that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction." *Ward v. Race Horse, supra*. There is, in fact, no more reason to find a repeal of the treaty privilege by implication than to find a repeal of all of the statutes regulating the Indians, except, perhaps, those which might be sustained under the commerce clause. This would mean a termination of the wardship which, as we have seen, has not occurred.

The Indians are, as appellants say, entitled to the privileges and subject to the duties of citizenship, *except* as those privileges and duties are qualified by treaties or statutes of the United States. The claim of the appellees rests upon one such qualification.

CONCLUSION

The relevant history is not a tribute to the Whites. The only purpose of the covenant in the first place was to protect the Indians in the enjoyment of their ancient source of livelihood against the newcomers who were entering the territory. Since the time of the treaty the newcomers have increased enormously. There are mills, dams, deforested areas, sewage, as well as modern fishermen, all destroying the fish supply. Following a familiar pattern, a defenseless minority has been singled out for blame and there has been a great hue and cry against the Indians, although their activities are a comparatively insignificant factor in the depletion of fish. The treaty rights asserted by the Makahs were recognized for nearly eighty years; they are rights arising out of immemorial customs of the Makahs, an essential part of their way of life. We respectfully urge that the decree of the District Court protecting those rights be affirmed.

Respectfully submitted,

VANDERVEER, BASSETT & GEISNESS,
Attorneys for Appellees.

In the
United States Circuit Court
of Appeals
for the
Ninth Circuit

No. 9924

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Appellants,

vs.

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APPEAL FROM THE DISTRICT COURT OF THE
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OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

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T. H. LITTLE,
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Attorneys for Appellants.

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Attorneys for Appellants.

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In the
United States Circuit Court
of Appeals
for the
Ninth Circuit

No. 9924

B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington,

Appellants,

vs.

Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

APPELLANTS' REPLY BRIEF

DOES THIS CASE INVOLVE "THE POWER OF THE STATE TO
IMPOSE SOME TYPE OF REGULATION" ON THE EXERCISE
OF THE FISHING RIGHTS IN QUESTION?

Appellees state:

" * * * We are not now concerned with the power
of the state to impose some type of regulation. Whatever

power it may have to regulate the exercise of the fishing rights, may it go further and altogether prevent their exercise?" (Appellees' brief, page 11. See, also, page 22.)

Appellants cannot agree with that statement as to the basic issue in the case. We insist that the converse is actually the case. While it is true that it was pleaded that appellants have "intentionally prevented any fishing by the Makah Indians in any part of the Hoko River" (Appellees' brief, p. 3), appellants' acts were pursuant to *regulatory* statutes of the State of Washington.

Appellees, on the contrary, prayed that appellants be permanently enjoined and restrained

" * * * from *in any manner whatsoever* interfering with or depriving the plaintiffs (appellees) herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described." (Tr. 10.)

Likewise, the decree appealed from permanently enjoins and restrains appellants

" * * * from *in any manner whatsoever* interfering with the exercise by the plaintiffs (appellees) herein, or any of the members of the Makah Indian Tribe, of their rights and privileges of fishing in their usual and accustomed place hereinabove described * * *" (Italics supplied.) (Tr. 57.)

Not only has the entire case been litigated on the basis of the power of the State of Washington to *regulate* the fishing rights in question, but there cannot be the slightest question but that under the pleadings and under the decree appealed from the State of Washington has been permanently enjoined from any act of regulation, regardless of the nature of the regulation involved.

Appellants *do not* claim the right to "take away" any right granted by the treaty in question. They seek only to subject some of those rights (the "off the reservation" fishing rights) to the regulatory statutes of the state, on

a non-discriminatory basis. Whereas the fishing rights granted by the treaty on the Indian reservation and in streams bordering the reservation are exclusive, the "off the reservation" rights were granted "in common with all citizens." As to the exclusive rights granted by the treaty, the State of Washington does not even insist upon the power to regulate. But as to the rights simply granted "in common with all citizens," the State of Washington insists that those rights are on a parity with similar rights possessed by all citizens, and are to be exercised under the same conditions as our the similar rights possessed by non-Indians.

Even the licensing statute to which appellants contend appellees are subject is purely *regulatory* in character. The statute, section 1, chapter 149, Laws of Washington, 1937 (Remington's Revised Statutes (Supp.), section 5703) reads:

"Licenses herein required *shall* be issued to any qualified person * * * upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be indorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries and game. All applications for licenses shall be filed with the state treasurer accompanied by the proper fee, which shall be respectively as follows: * * *")

(The disqualifications are set forth in section 1, chapter 170, Laws of 1929 (Remington's Revised Statutes, section 5695), which specifically provides that:

"Nothing herein contained shall be construed to prevent the issuance of licenses to Indians, providing such applicants possess the qualifications of residence herein required, * * *")

It will be noted that the statute vests no discretion in the licensing officials. Issuance of a license is *mandatory* upon compliance with the purely formal requirements of the statute. The licensing provisions are thus only regulatory in nature. No "taking away" of any privilege is contemplated or made possible.

"It is well settled that the state under its police power has the right to regulate any business, occupation, trade, or calling in order to protect the public health, morals and welfare, subject to the restrictions of reasonable classification. *This power to regulate includes the power to license*; and it is the settled general rule that to protect the health, morals, and welfare of the public a state can license an occupation, trade, or calling." 33 Am. Jur. 336, Licenses, Section 17. (Italics supplied.)

HAS WARD V. RACEHORSE BEEN OVERRULED BY MISSOURI V. HOLLAND?

Appellees state:

"* * * It is well established, however, that the state cannot, even in the exercise of its police power, curtail treaty rights. In 63 C. J., p. 844, Sec. 27, the rule is stated:

"'A treaty must be regarded as part of the law of a state as much as are the state's own local laws and constitution, and is effective and binding on the state legislature. So a treaty may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state; and the treaty-making power is superior to the reserved powers of the state, including the police power, provided the subject matter of the treaty is not arbitrary and disconnected and remote from international intercourse.' " (Appellees brief, p. 28.)

The sole authority cited by Corpus Juris in support of the pertinent portion of the above quotation is *Missouri v. Holland*, 252 U. S. 416, 64 L. Ed. 641.

As pointed out in our opening brief, *Ward v. Racehorse*, 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076; *Coyle v.*

Smith, 221 U. S. 559, 55 L. Ed. 853, 3 S Ct. 688; and *State ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. Ed. 1166, 36 S Ct. 705, hold otherwise, and the question thus resolves itself into whether or not the effect of those decisions has been cut down or nullified by the decision in *Missouri v. Holland*, *supra*. That such is actually the effect of appellees' contention is apparent from the statement on page 32 of their brief, where they say:

"So far as the *Race Horse* case may be taken to hold that no treaty of the United States may abridge the police power of the state it must be considered overruled by *Missouri v. Holland*, 252 U. S. 416, 64 L. Ed. 641
* * *"

It will be noted that *Ward v. Racehorse*, *supra*, *Coyle v. Smith*, *supra*, and *State ex rel. Kennedy v. Becker*, *supra*, all of which support appellants position, are not so much as mentioned in the *Missouri v. Holland* opinion. Had it been the intention of the Court to overrule or cut down the effect of those decisions, it obviously would have made some reference to them, since each of those cases was cited to the court (see 64 L. Ed. 645).

Furthermore, the basis for the decision in *Missouri v. Holland* is clearly indicated in the concluding paragraph of the opinion, which reads:

"Here a *national* interest of very nearly the first magnitude is involved. It can be protected *only* by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld.

Carey v. South Dakota, 250 U. S. 118. * * *” (Italics supplied.)

In the instant case, on the other hand, we are concerned with the opposite situation—a *local* rather than a national interest is involved, and reasons which, in *Missouri v. Holland*, called for the supremacy of the Federal statutes, in the instant case call for the supremacy of the state regulatory statutes. In *Missouri v. Holland*, the Court was of the opinion that to hold the state statutes valid would be to prevent effective bird conservation. In the instant case, on the contrary, effective fish conservation depends upon the validity of the statute in question. Every fishing place in the State of Washington is a “usual and accustomed” fishing place for some tribe of Indians, and if Indians are free, under the typical treaty provisions here in question, to fish when, where, and how much they please, effective fish conservation is *impossible*.

ARE *WARD V. RACEHORSE*, *STATE EX REL. KENNEDY V. BECKER*, AND *U. S. V. WINANS* DISTINGUISHABLE?

Appellees have attempted to distinguish the cases of *Ward v. Racehorse*, 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076, and *State ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. Ed. 1166, 36 S. Ct. 705, and, in the case of *U. S. v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, assert that the pertinent portion of the opinion is dictum.

(1) *WARD V. RACEHORSE*.

As to the case of *Ward v. Horsehorse*, *supra*, appellees' position is based upon what is asserted to be

“ * * * certainly a strong implication at least that rights which are not ‘essentially perishable and intended to be of a limited duration’ but which, like the Makahs,’ are permanently reserved, cannot be destroyed by the state.” (Appellees’ brief, p. 18.)

And, at page 30, after admitting that

“there is language in the Race Horse case that suggests that the Enabling Act might have such an operation” (i. e. that it might cut down treaty rights as “against the police power of the State”),

appellees insist:

“ * * * but the Court could not have intended to so hold.”

We will let the language of the decision speak for itself.

(2) STATE EX REL. KENNEDY V. BECKER.

State ex rel. Kennedy v. Becker, supra, on the other hand, is sought to be distinguished on the basis of the statement in that opinion that:

“ * * * the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty *whether fully appreciated or not.*” (Appellees’ brief, page 19; italics supplied.)

Appellees then go on to state:

“It is of no significance that the Indians did or did not appreciate the sovereign power of the United States Government. It must be conceded that the United States Government may impair the treaty rights, if it chooses, * * * We are here concerned with the power of the state and the question is whether the Indians understood that their right to fish was subject to the sovereign power of the state. However, only by recourse to fancy can it be conceived that the Indians understood that the United States Government itself could, without violence to the treaty, abrogate the fishing rights in question, in the name of conservation. (In fact, it is most probable that the Makahs had no conception at all of sovereignty as we understand it. * * *”) (Appellees’ brief, page 20.) (Original italics and parenthesis.)

Frankly, we fail to see the logic of appellees’ position. After conceding that the treaty rights are subject to the sovereign power of the United States Government despite

the fact that "it is most probable that the Makahs had no conception at all of sovereignty as we understand it," appellees insist that the sovereign power of the State of Washington is cut down because the Indians did not understand that their rights were subject to the sovereign powers of the State. Furthermore, we fail to see how the fact of understanding or lack of understanding by the Makahs or by anyone else can have any effect on the extent of the sovereign powers of the State of Washington.

(3) UNITED STATES V. WINANS.

Appellees state:

"It is true that in *United States v. Winans, etc.*, 198 U. S. 371, 25 S. Ct. 662, 49 L. ed. 1089, the court, referring to a treaty similar to the one at bar, said,

" * * * nor does it restrain the state unreasonably if at all, in the regulation of the right."

"The statement is *dicta* because the case involved merely the right of the Indians as against a private individual who had acquired title * * *" (Appellees' brief, page 23.)

A reading of the opinion will show that the statement in question was part of the court's direct answer to the contention " * * * that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union." Furthermore, in *State ex rel. Kennedy v. Becker, supra*, the court expressly recognized *United States v. Winans, supra*, as authority for the proposition that the treaty rights in question are " * * * subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised," which question was directly before the court for decision in the latter case.

COYLE v. SMITH.

As pointed out in appellants' opening brief, the Supreme Court, in *Coyle v. Smith*, 221 U. S. 559, 55 L. Ed. 853, 3 S. Ct. 688, had occasion to hold:

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

"This deduction finds support in * * * *Ward v. Race Horse*, 163 U. S. 504; * * * " (Page 573.)

(As indicated in our opening brief, at page 30, the citation of *Ward v. Racehorse, supra*, clearly indicates that the enunciated rule applies to limitations imposed by prior treaties as well as to those inserted in enabling acts.)

And at page 576 of the *Coyle* opinion, the Court expressly construed *Ward v. Racehorse, supra*, as direct authority for the very position that appellants take in this case, when it said:

"In *Ward v. Race Horse, supra*, the necessary equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming." (Italics supplied.)

It is still our contention that the principle so clearly enunciated by the Court in *Coyle v. Smith, supra*, is decisive of this case, in appellants' favor. It will be noted that appellees, in their brief, have not so much as mentioned that decision.

CONCLUSION

Accordingly, it is submitted that the fishing rights in question are subject to the paramount and superior right of the State of Washington, in the exercise of its sovereign police power, to regulate the taking of fish from the water within its jurisdiction, and that, therefore, the judgment of the District Court should be reversed and the permanent injunction dissolved.

Respectfully submitted,

SMITH TROY,

Attorney General of the State of Washington,

T. H. LITTLE,

Assistant Attorney General of the State of Washington,

Attorneys for Appellants.

United States 9
Circuit Court of Appeals
For the Ninth Circuit.

FREDERIC A. CLARKE, sometimes known as
FREDERICK A. CLARKE,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

JAN - 7 1942

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

FREDERIC A. CLARKE, sometimes known as
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MERLE P. LYON, Esq.,
Special Assistant to Chief Counsel,
Federal Trade Commission,
Washington, D. C. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California

No. 1553-BH

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

FREDERICK A. CLARKE,

Defendant.

APPLICATION FOR AN ORDER REQUIRING
THE GIVING OF EVIDENCE

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

The Federal Trade Commission (hereinafter referred to as the petitioner), pursuant to authority conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C. A., Sec. 49), respectfully applies to this Honorable Court for an order requiring Frederick A. Clarke to appear before the petitioner or an examiner now or subsequent hereto designated by it, and answer questions which on July 20, 1939 and subsequently on to-wit June 13, 1940, the said Frederick A. Clarke refused to answer, and to answer all questions which may be necessary and proper to the conduct of a proceeding hereinafter mentioned; and in support of such application shows as follows: [2]

Paragraph One: On December 8, 1938, the petitioner issued its complaint against Frederick A. Clarke, an individual, trading as Bonequet Laboratories, stating therein that the petitioner had reason to believe that the respondent in such complaint had been and was still violating the provisions of the Federal Trade Commission Act. On January 3, 1939, the respondent filed his answer to said complaint, and hearings were commenced before John J. Keenan, a trial examiner of the petitioner designated by it to prosecute the inquiry under the aforesaid complaint.

Paragraph Two: On May 25, 1939, the petitioner issued and caused to be served by registered mail on June 2, 1939 upon the said Frederick A. Clarke a subpoena requiring his presence at 9:00 A. M., P. S. T., July 20, 1939, before the said John J. Keenan in Room 229, Post Office Building, Los Angeles, California, to testify at the instance of the petitioner in the aforesaid proceeding instituted by the petitioner against Frederick A. Clarke, an individual, trading as Bonequet Laboratories.

Paragraph Three: At the time and place fixed in said subpoena the said Frederick A. Clarke appeared and was sworn as a witness, but refused to answer any and all questions propounded to him by counsel for your petitioner, which questions were designed and intended to bring out certain facts within the particular [3] knowledge of the said Frederick A. Clarke. The propounding of such questions and the refusal of said Frederick A. Clarke

to answer the same appears in the transcript of the hearing of the aforesaid proceeding of that date.

Paragraph Four: Subsequently, William C. Reeves was designated and appointed by the petitioner to take testimony and receive evidence in this proceeding in the place and stead of said John J. Keenan. Subsequently, on to-wit June 5, 1940, the petitioner issued and caused to be served by registered mail on June 10, 1940 upon the said Frederick A. Clarke a subpoena requiring his presence at 10:00 A. M., P. S. T., June 13, 1940, before the said William C. Reeves in Room 216, Chamber of Commerce Building, Los Angeles, California, to testify at the instance of the petitioner in the aforesaid proceeding instituted by the petitioner against Frederick A. Clarke, an individual, trading as Bonquet Laboratories.

Paragraph Five: At the time and place fixed in said subpoena the said Frederick A. Clarke appeared and was sworn as a witness, but refused to answer any and all questions propounded to him by counsel for your petitioner, which questions were designed and intended to bring out certain facts within the particular knowledge of the said Frederick A. Clarke. The propounding of such questions and the refusal of said Frederick A. Clarke to answer the same appears in the transcript of the hearing of the aforesaid proceeding of that date. [4]

Paragraph Six: Subsequently counsel for your petitioner appeared before this Honorable Court to invoke its aid in requiring the testimony of said

Frederick A. Clarke, and an order was entered by this Honorable Court in Case No. Misc. F-2-J In Equity requiring the said Frederick A. Clarke to appear and testify before the duly appointed trial examiner of the Federal Trade Commission, William C. Reeves, at a certain time and place fixed in said order. Your petitioner further shows, however, that the United States Marshal was unable to serve a copy of said order upon the said Frederick A. Clarke, and that service was not at any time had thereon.

Paragraph Seven: Section 9 of the aforesaid Federal Trade Commission Act provides as follows:

“Sec. 9. That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

“Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States,

at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. [5]

“Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *”

Wherefore, the petitioner invokes the aid of this Honorable Court in requiring the attendance and testimony of the said Frederick A. Clarke in the aforementioned proceeding, and prays this Honorable Court to issue an order requiring the said Frederick A. Clark

- 1) To appear before the petitioner on or before the examiner already designated by it or before any other examiner designated by it, at a time and place fixed by the petitioner within the jurisdiction of this Honorable Court;

- 2) To give evidence and testimony touching the matters brought in question by the complaint of the

petitioner hereinbefore mentioned and the answer thereto;

3) To answer all the questions which on July 20, 1939 and on June 13, 1940 he refused to answer; [6]

4 To answer all other questions relevant and material in the said proceeding;

And for such other and further relief as may be just and proper in the premises.

Respectfully,

MERLE P. LYON,

Trial Attorney,

Federal Trade Commission.

Dated: April 18, 1941. [7]

[Title of District Court and Cause.]

District of Columbia—ss.

Merle P. Lyon, of full age, being duly sworn according to law, upon his oath deposes and says that he is an attorney of the Federal Trade Commission, the petitioner herein; that he has read the foregoing application, and that the statements herein contained are true; that he has been authorized by the Federal Trade Commission to execute this verification.

(Sgd) MERLE P. LYON

Sworn and subscribed to before me this 18th day of April, 1941.

[Seal]

EDNA B. VINCEL

Notary Public, District of Columbia.

My Commission expires: May 14, 1944.

[Endorsed]: Filed May 22, 1941. [8]

[Title of District Court and Cause.]

ORDER COMPELLING OBEDIENCE TO
SUBPOENA.

The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance of Frederick A. Clarke as a witness in the proceeding instituted by the Federal Trade Commission against Frederick A. Clarke, an individual trading as Boncquet Laboratories, and in requiring the testimony of the said Frederick A. Clarke; and

The Court having considered said application, it is hereby

Ordered that the said application be, and the same is, hereby granted, and that the said Frederick A. Clarke be, and he is, hereby ordered to appear at 10 A. M., P. S. T., June 16, 1941, at Room 255, Post Office Building, City of Los Angeles, State of California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against Frederick A. Clarke, an individual trading as Boncquet Laboratories, or before any other examiner designated by the said Commission to prosecute the said inquiry; to give evidence and testimony of the aforesaid time and place touching matters brought in question by the complaint [10] of the Federal Trade Commission against Frederick A. Clarke, an individual trading as Boncquet Laboratories, and the answer thereto; to answer at said time and place all the questions

which on July 20, 1939 and on June 13, 1940, the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

It Is Hereby Further Ordered that service of this order may be made upon the said Frederick A. Clarke by leaving a true copy hereof at his place of business located at 1416-18 South Central Avenue, Glendale, California.

(Sgd) PAUL J. McCORMICK

United States District Judge

Dated: May 23, 1941.

10:05 A. M.

[Endorsed]: Filed May 23, 1941. [11]

[Title of District Court and Cause.]

MOTION FOR ORDER RECALLING, ANNUL-
LING, AND VACATING ORDER COMPEL-
LING OBEDIENCE TO SUBPOENA.

To the Honorable District Court of the United States for the Southern District of California, Central Division, and to the Honorable Ben Harrison, Judge Thereof:

Frederic A. Clarke, sued herein as Frederick A. Clark, hereby moves the Honorable Court above-named for its Order Recalling, Annulling, and Vacating that certain Order Compelling Obedience to Subpoena, signed herein on May 23rd, 1941, by Honorable Paul J. McCormick, a Judge of the above-named Honorable Court.

This Motion is based upon the Notice of Hearing of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena, the Order Shortening Time, Memorandum of Points and Authorities, and Affidavit of Frederic A. Clarke in support of Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena, all of which are attached hereto; the Codes, Laws, and Statutes of the United States of America, and of the State of California, and the records and files of the court in this cause.

Dated this 1st day of July, 1941.

ELDON V. SOPER

Attorney for Frederic A.
Clarke, sued herein as
Frederick A. Clark. [12]

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTION FOR
ORDER RECALLING, ANNULLING, AND
VACATING ORDER COMPELLING OBEDI-
ENCE TO SUBPOENA.

To the Petitioner, Federal Trade Commission, and
to Merle Lyon, Esq., Its Attorney:

Please take notice that on Monday, the 7th day
of July, 1941, at the hour of 10:00 o'clock A. M.,
P. S. T., of said day, or as soon thereafter as coun-
sel can be heard, in the court room of Honorable
Ben Harrison, a Judge of the District Court of the
United States in and for the Southern District of
California, Central Division, located in court room
No. 6 on the second floor of the United States Post
Office and Court House Building, otherwise known
as the Federal Building, located at Main and Temple
Streets, in the City of Los Angeles, County of Los
Angeles, State of California, the within and forego-
ing Motion for Order Recalling, Annulling, and Va-
cating Order Compelling Obedience to Subpoena
will be heard, argued and submitted.

Dated this 1st day of July, 1941.

ELDON V. SOPER

Attorney for Frederic A.
Clarke, sued herein as
Frederick A. Clark. [13]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Upon the Application of Eldon V. Soper, attorney for Frederic A. Clarke, sued herein as Frederick A. Clark, and good cause appearing therefor:

It Is Hereby Ordered that time of service of the within and foregoing Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena, and of the Notice of Hearing of Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena herein, is so shortened that service thereof in the manner hereinafter provided, is herein adjudged to be sufficient notice of the proceedings mentioned therein.

It Is Further Ordered that service of the foregoing Motion, the Notice of Hearing of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena herein, and the papers referred to therein, including this Order Shortening Time, may be made by depositing the same in the United States Post Office at Los Angeles, California, on July 1, 1941, at or before the hour of 4:00 o'clock P. M. of said day, in an envelope addressed as follows, to-wit:

“Merle P. Lyon, Esquire,

Trial Attorney,

Federal Trade Commission,

Washington, D. C.” [14]

and that said envelope shall be marked Air Mail and the postage thereon shall be fully prepaid at the time of depositing, as aforesaid;

It Is Further Ordered that a copy of said papers shall be left for said Merle P. Lyon, Esquire, in care of the Clerk of this Court, on July 1, 1941, at or before the hour of 4:00 o'clock P. M. of said day.

Dated the 1st day of July, 1941.

BEN HARRISON,

Judge of the United States District Court. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE IN
SUPPORT OF MOTION FOR ORDER RE-
CALLING, ANNULING, AND VACATING
ORDER COMPELLING OBEDIENCE TO
SUBPOENA.

In the United States of America,
Southern District of California—ss.

Central Division, State of California,
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

That your affiant is the same person who is sued herein as Frederick A. Clark;

That your affiant has read the Application for Order Requiring the Giving of Evidence in the within and above-entitled proceeding;

That it is true as set forth in said Application that your affiant appeared on July 20, 1939 before John J. Keenan, an Examiner for the Petitioner herein, and that your affiant was then sworn as a witness; that it is not true as set forth in said Application that your affiant then "refused to answer any and all questions propounded to him by counsel" for the Petitioner; that your affiant did then refuse to answer certain questions propounded to him by counsel for the petitioner, and that your affiant did so upon the advice of his attorney; that said attorney informed your affiant, and your affiant believes and so states that the questions then propounded to your affiant as aforesaid, and which your affiant then [16] refused to answer were and are incompetent, irrelevant, and immaterial.

That it is true that as set forth in said Application that on June 13, 1940, your affiant appeared before William C. Reeves, an Examiner for the Petitioner herein, and that your affiant was then sworn as a witness; that it is not true as set forth in said Application that your affiant then "refused to answer any and all questions propounded to him by counsel", for the Petitioner; that your affiant did then refuse to answer certain questions propounded to him by counsel for the Petitioner, and that your affiant did so upon advice of his attorney; that said attorney informed your affiant, and your affiant believed and so states, that *he* questions then propounded to your affiant, as aforesaid, and which

your affiant then refused to answer, were and are incompetent, irrelevant and immaterial.

That your affiant has no information or belief sufficient to enable him to answer the allegation contained in said Application; that an Order was thereafter entered in this Honorable Court requiring your affiant to appear "at a certain time and place fixed in said Order"; that to the best of the knowledge, information and belief of your affiant, no attempt was made to serve your affiant with said Order.

That your affiant is, and at all times since April 1, 1937 has been, doing business in the City of Glendale, County of Los Angeles, State of California, under the firm name and style of Bonquet Laboratories; that it is true that your affiant was outside of the State of California from about March 15, 1939 to about June 20, 1939, and that your affiant was also outside of the State of California for shorter periods of time on other occasions; that your affiant has never refused to obey any Subpoena issued by the Federal Trade Commission, or by the above-named Honorable Court, or by any other court. That your affiant is not in contempt of the Federal Trade [17] Commission.

That your affiant has examined the records and files of the above-named Honorable Court in this proceeding, including the docket, and that it does not appear therefrom that any transcript of the hearings of the above-mentioned proceedings has been filed herein; that it does not appear from the

foregoing Application what questions were propounded to your affiant on the occasions mentioned therein, nor what questions your affiant then refused to answer; nor does said Application contain any showing as to the issues in the controversy between the Federal Trade Commission and your affiant.

The hearing mentioned in the Order Compelling Obedience to Subpoena on file herein was continued to July 7, 1941, at 10:00 o'clock A. M., P. S. T., by order of Edward E. Reardon, a Examiner of the Federal Trade Commission; that the foregoing Application was presented ex-parte on or about May 23, 1941 to Honorable Paul J. McCormick, Judge of the above named Honorable Court; that neither your affiant or his attorneys were given any Notice of said Application, nor any opportunity to be present thereat, or to be heard thereon; that said Order to Compel Obedience to Subpoena was issued without any Notice thereof being given to your affiant or to his attorneys.

That your affiant is informed by his attorney, and believes and so states, that unless the Order Compelling Obedience to Subpoena is Recalled, Annulled, and Vacated in accordance with the accompanying Motion, that your affiant will be compelled to answer any and all questions which may be propounded to him by counsel for the Federal Trade Commission on July 7, 1941, at the hour of 10:00 A. M., P. S. T., or thereafter, whether said questions are competent, relevant, immaterial, and whether or not said questions touch or pertain to

the issues in the controversy between the Federal Trade Commission and your affiant, and that if your affiant then [18] refuses to answer said questions, or any thereof, that a proceeding will be commenced to punish your affiant for contempt.

Wherefore, your affiant prays that this Honorable Court make its Order Recalling, Annulling, and Vacating the Order Compelling Obedience to Subpoena, dated May 23, 1941, and signed by Honorable Paul J. McCormick, Judge of the District Court of the United States in and for the Southern District of California, Central Division.

FREDERIC A. CLARKE

Subscribed and sworn to before me this 1st day of July, 1941.

[Seal]

LEETA MANNING,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 1, 1941. [19]

[Title of Cause.]

AFFIDAVIT

United States of America,
Southern District of California,
Los Angeles County—ss.

Merle P. Lyon, being duly sworn, deposes and says:

1. I am a special assistant to William T. Kelley, Chief Counsel for the Federal Trade Commis-

sion, Petitioner in the above-entitled cause, and I am trial attorney for said Federal Trade Commission in the case now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660.

2. On December 8, 1938, the Petitioner issued its complaint against the defendant, stating therein that the petitioner had reason to believe that the respondent in said complaint had been and was still violating the provisions of the Federal Trade Commission Act. On January 3, 1939, the said respondent, Frederick A. Clarke, filed his answer to said complaint, and hearings were commenced before a trial examiner of the petitioner duly designated by it to prosecute the inquiry under the aforesaid complaint.

3. Subsequently, on to-wit, July 20, 1939 and on June 13, 1940, the said respondent Frederick A. Clarke, having been duly subpoenaed as a witness in said pending proceeding, refused to answer any and all questions propounded to him by counsel for your petitioner, which said questions were designed and intended to bring out certain facts within [20] the particular knowledge of the said respondent.

4. Subsequently, on to-wit May 23, 1941, and pursuant to the prayer of a petition filed by your petitioner in the above-entitled cause, an order was duly entered herein directing that the said Frederick A. Clarke, defendant herein, appear at 10 A. M. P. S. T. June 16, 1941, at Room 255, Post

Office Building, City of Los Angeles, State of California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against the said Frederick A. Clarke, an individual trading as Bonequet Laboratories, and give evidence and testimony at said time and place touching matters brought in question by the complaint of the Federal Trade Commission against the said Frederick A. Clarke and his answer thereto, and to answer at said time and place all the questions which on July 20, 1939 and June 13, 1940 the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; and to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall be completed.

5. All of which will more fully appear from a copy of such order hereto annexed and marked "Exhibit A."

6. A copy of such order was personally served upon the said Frederick A. Clarke, on the 4th day of June, 1941, as more fully appears from the affidavit of service attached to said Exhibit A.

7. Said defendant, Frederick A. Clarke, did not appear at the time [21] and place designated in

said order, but an attorney purporting to represent said defendant appeared and presented to the trial examiner of the Federal Trade Commission a physician's certificate to the effect that said defendant was ill and under the care of a physician, and that he would be unable to attend such hearing without danger to his health. Thereupon the hearing before the trial examiner of the Federal Trade Commission was necessarily continued until July 7, 1941, at 10 A. M.

8. Subsequently, a petition was filed by the said Frederick A. Clarke in this cause seeking to vacate and set aside the order entered herein on May 23, 1941 compelling the said Frederick A. Clarke to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the pending matter before the Federal Trade Commission in which the said Frederick A. Clarke was respondent. Said petition was duly heard by this Court on July 7, 1941, and after such hearing was duly denied.

9. Thereafter, on to-wit, July 7, 1941, the said Frederick A. Clarke appeared before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, and gave certain testimony relative to the issues in the certain matter pending before the Federal Trade Commission docketed at Docket 3660, entitled Federal Trade Commission v. Frederick A. Clarke, trading as Bonquet Laboratories. Said Frederick A. Clarke, however, refused to answer certain relevant and proper questions propounded

to him by counsel for the Federal Trade Commission pertaining to the formula, composition, and ingredients of his product known as Bonequet Blood Building Tablets or Bonequet Tablets, the answers to said questions being peculiarly and exclusively within the personal knowledge of said Frederick A. Clarke. Said Frederick A. Clarke was thereupon ordered and directed by said Edward E. Reardon, [22] trial examiner of the Federal Trade Commission, to answer said questions, but he thereupon refused to do so, or to give further evidence deemed by said trial examiner to be pertinent and admissible in said proceeding. Said Frederick A. Clarke based his refusal to testify as thus directed upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation.

10. The complaint now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket 3660, charges said respondent with false and misleading advertising and unfair and deceptive acts and practices in connection with the sale and distribution of his product "Bonequet Tablets", and said proceeding was instituted by your petitioner in the public interest for the protection of the public against false and misleading therapeutic claims made by respondent for said product. In order to properly dispose of the issues now pending before it, it is necessary and imperative for the Federal Trade Commission to have full and

complete information concerning the formula of respondent's product, and respondent's refusal to testify with reference thereto will of necessity hamper and handicap the efforts of the said Commission to properly decide the issues now pending before it in said cause.

11. All of the testimony and other evidence heretofore adduced in the pending proceedings before the Federal Trade Commission in the Matter of Frederick A. Clarke, trading as Boncquet Laboratories, has been reduced to writing, and is ready to be produced before this Honorable Court by this affiant at any hearing which may be ordered held herein to determine the merits of the motion to show cause now [23] pending herein.

Dated July 8, 1941.

MERLE P. LYON,

Trial Attorney, Federal Trade Commission.

Sworn to before me this 8th day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court
for the Southern District of
California.

By J. M. HORN,

Deputy Clerk.

[Endorsed]: Filed Jul. 8, 1941. [24]

[Title of District Court and Cause.]

DEMURRER

Comes now the Respondent, Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and demurs to the Affidavit for Order to Show Cause in re Contempt, executed by Merle P. Lyon under date of July 8, 1941, on file herein, on the following, and each of the following grounds, to-wit:

I.

That said Affidavit does not state facts sufficient to constitute a cause of contempt against the Respondent.

II.

That said Affidavit is insufficient to confer jurisdiction on the above-entitled court to try or punish the Respondent for contempt.

Wherefore, Respondent prays that this demurrer be sustained and that the contempt proceeding initiated by said Affidavit and Order to Show Cause herein, be dismissed.

ELDON V. SOPER,

Attorney for Respondent, Frederic A. Clarke.

[Endorsed]: Filed Jul. 14, 1941. [25]

[Title of Cause.]

MOTION FOR ORDER TO SHOW CAUSE.

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

Now comes the Federal Trade Commission, petitioner in the above-entitled cause, and moves the Court for an order against the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of this court upon the grounds set forth in the affidavit of Merle P. Lyon, special assistant to the Chief Counsel of the Federal Trade Commission, verified the 14th day of July, A. D., 1941, which is hereto attached and made a part hereof.

Dated July 14, 1941.

MERLE P. LYON,

Attorney for the Federal Trade Commission. [26]

[Title of Cause.]

AFFIDAVIT

United States of America,
Southern District of California,
Los Angeles County—ss.

Merle P. Lyon, being duly sworn, deposes and says:

1. I am a special assistant to William T. Kelley, Chief Counsel for the Federal Trade Commission,

Petitioner in the above-entitled cause, and I am the trial attorney for said Federal Trade Commission in the case now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660.

2. On December 8, 1938, the Petitioner issued its complaint against the defendant, stating therein that the petitioner had reason to believe that the respondent in said complaint had been and was still violating the provisions of the Federal Trade Commission Act. A copy of said complaint is attached hereto marked "Exhibit A" and hereby made a part hereof. On January 3, 1939, the said respondent, Frederick A. Clarke, filed his answer to said complaint, a copy of which answer is hereto attached Marked "Exhibit B" and hereby made a part hereof. Hearings were commenced before a trial examiner of the petitioner duly designated by it to prosecute the inquiry under the aforesaid complaint.

3. Subsequently, on to-wit, July 20, 1939 and on June 13, 1940 respectively, the said respondent Frederick A. Clarke, having been duly subpoenaed as a witness in said pending proceeding, refused to answer any and all questions propounded to him by counsel for your petitioner, which said questions were designed and intended to bring [27] out certain facts within the particular knowledge of the said respondent.

At the hearing on July 20, 1939 held in Los An-

geles, California, respondent was asked by Dewitt T. Puckett, counsel for the Federal Trade Commission, the following question:

Q. Mr. Clarke, what is your address?

The following then occurred as shown by the official transcript in Docket 3660 in the Matter of Frederick A. Clarke, trading as Bonequet Laboratories:

“Mr. Castruccio: Now, just a moment. Mr. Clarke, we instruct you to decline to answer, on the grounds we have already stated, as your counsel. We respectfully submit to this Commissioner that the complaint does not state facts sufficient to constitute a cause of action, and that the Commission has not any jurisdiction, and for the further reason that it is a violation of your constitutional rights requiring you to testify in a manner that might tend to incriminate you; and for those reasons we instruct you to decline to answer the question. Now, you can just state to Mr. Puckett that you decline to answer on the advice of counsel.

The Witness: I decline to answer on the advice of counsel.

By Mr. Puckett: Q. Do you decline to answer any questions I propound to you?

A. That is right.” (Docket 3660 FTC. pp. 9, 10)

Subsequently, on to-wit, July 22, 1939 at a hearing held in Los Angeles, California, Mr. Frederick A. Clarke again refused to answer any and all

questions put to him by counsel for the Commission. At page 196 of the official record he was asked the following question:

“Q. Now, Mr. Clarke, I hand you Commission’s Exhibit 9 for identification, which is a small pamphlet, or leaflet, the front cover of which contains this statement, ‘New, fighting blood in nine days,’ and ask you to state whether or not that is some of the advertising you have used?

Mr. Castruccio: Just a moment, Mr. Clarke. We instruct the respondent to decline to answer on the advice of counsel, for the reasons heretofore given.

The Witness: I decline to answer on the advice of counsel for the reason heretofore given.” (FTC Docket 3660, pp. 196, 197)

Subsequently, on to-wit, June 13, 1940, at a hearing held in Los Angeles, California, the following questions and answers appear at Page 280 of the official record in Docket 3660:

“Q. Under what name are you doing business? [28]

Mr. Castruccio: Just a moment, Mr. Clarke. We instruct you to decline to answer any further questions on the ground that the respondent objects to the jurisdiction of the Commission as heretofore shown on the record and for that reason all these questions are incompetent, irrelevant and immaterial until the ques-

tion of jurisdiction has been determined, and therefore, you are instructed on the advice of counsel to decline to answer any further questions.

Trial Examiner Reeves: The witness is directed to answer the question.

The Witness: I refuse to answer on the advice of counsel.

Q. Then, you refuse to answer any questions with reference to the complaint in this matter, Mr. Clarke?

A. I do, on the advice of counsel."

4. Subsequently, on, to-wit May 23, 1941, and pursuant to the prayer of a petition filed by your petitioner in the above-entitled cause, an order was duly entered herein directing that the said Frederick A. Clarke, defendant herein, appear at 10 A. M., P. S. T. June 16, 1941, at Room 255, Post Office Building, Los Angeles, California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against the said Frederick A. Clarke, an individual, trading as Boncquet Laboratories, and give evidence and testimony at said time and place touching matters brought in question by the complaint of the Federal Trade Commission against the said Frederick A. Clarke and his answer thereto, and to answer at said time and place all the questions

which on July 20, 1939 and June 13, 1940 the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; and to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall be completed. Copy of said order was personally served upon the said Frederick A. Clarke on the 4th day of June, 1941, as will [29] appear from copy of said order attached hereto as Exhibit C and made a part hereof.

5. Said defendant, Frederick A. Clarke, did not appear at the time and place designated in said order, but an attorney representing said defendant appeared and presented to the trial examiner of the Federal Trade Commission a physician's certificate to the effect that said defendant was ill and under the care of a physician, and that he would be unable to attend such hearing without danger to his health. Thereupon, the hearing before the trial examiner of the Federal Trade Commission was necessarily continued until July 7, 1941 at 10 A. M.

8. Subsequently, a petition was filed by the said Frederick A. Clarke in this cause seeking to vacate and set aside the order entered herein on May 23, 1941 compelling the said Frederick A. Clarke to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the

pending matter before the Federal Trade Commission in which the said Frederick A. Clarke was respondent. Said petition was duly heard by this Court on July 7, 1941 and was duly denied.

9. Thereafter, on to-wit July 7, 1941, the said Frederick A. Clarke appeared before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, and gave certain testimony relative to the issues in the certain matter pending before the Federal Trade Commission docketed as No. 3660, entitled Federal Trade Commission v. Frederick A. Clarke, trading as Boncquet Laboratories. Said Frederick A. Clarke, however, refused to answer certain relevant and proper questions propounded to him by counsel for the Federal Trade Commission pertaining to the formula, composition and *ingredients* of his product known as Boncquet Tablets or Boncquet Blood Building Tablets, the answers to said questions being peculiarly and exclusively within the personal knowledge of said Frederick A. Clarke. The questions and answers material in this connection appear at p. 330 et seq. of the official transcript of the record in Docket 3660 as follows:

[30]

“Trial Examiner Reardon: Well, the question is, Mr. Clarke, what is the formula of that product that you produced and sold since some time in 1937, which you gave the date for.

The Witness: Well, one——

Trial Examiner Reardon: There is an objection to that, is there?

Mr. Soper: Yes, there is an objection.

Mr. Lyon: What is the ruling on it?

Trial Examiner Reardon: What would be the grounds for the objection, if you would like to state them on the record?

Mr. Soper: Yes. The objection is this: That, as I understand the only claim made by the Commission is that the product manufactured by Mr. Clarke may not contain the liver, liver extract, and he exhibited to me a couple of analyses made for the Commission by Government officials, and while the examinations indicated that there was—at least one of those examinations indicated that there was liver present, they were unable to ascertain what the liver content was. Now, if the only question is as to the liver content, as to whether or not it contains liver, it seems to me that the question could be answered categorically.

Trial Examiner Reardon: Well, the question at the present time is what the stenographer will read, and I will overrule the objection, and that will settle the question about the liver and whether it is there or not.

Mr. Soper: Of course, it does that, but it also compels him to disclose the formula.

Trial Examiner Reardon: I can only go according to the question and rule on the question. Will you read the question?

(The question was read).

The Witness: Well, it consists of, one, Raw liver principle extracted——

Trial Examiner Reardon: Does it state the quantity?

The Witness: No, it doesn't. In parenthesis, "(Red blood cell maturing factor.)"

By Mr. Lyon:

Q. What was that last part again?

A. "(Red blood cell maturing factor)."

Q. Maturing?

A. Yes. That is a description of the raw liver principle extract.

2. Dehydrated vegetable parsley concentrate.

Q. Parsley?

A. Parsley, p-a-r-s-l-e-y, concentrate.

3. Pure dried brewers' grain yeast.

4. Vitamin B-1.

5. Riboflavin, and then in parenthesis, (Vitamin G or B-2)

6. Pure dehydrated milk whey.

7. Dextrose, as a binder.

Trial Examiner Reardon: Those are all the ingredients? [31]

The Witness: That is right.

Trial Examiner Reardon: But that does not state the formula. The formula calls for the quantities.

By Mr. Lyon:

Q. Yes. What are the proportions of those different ingredients?

A. Of course, that is my trade secret.

Trial Examiner Reardon: Do you object?

Mr. Soper: Yes, I do.

Trial Examiner Reardon: I will have to overrule the objection and direct the witness to answer.

The Witness: Well, I would be divulging all my trade secrets.

Trial Examiner Reardon: I know that, but I can't help that. I have to direct you to answer. You are selling the product, and we are entitled to know.

The Witness: Well, I decline to answer, to divulge this trade secret.

Mr. Soper: As I understand it, Mr. Clarke, you are not unwilling to let the Commission know that you actually use liver?

The Witness: Oh, no. No, I can show you bills for thousands of dollars from the Swift Company, showing that I used liver, and I am not buying liver just to go out and throw it away and just to tell the Federal Trade Commission.

Trial Examiner Reardon: That isn't the point. The point is that the question calls for the formula, and you have only named the ingredients, without naming the amounts, proportionate amounts, that are used in constructing the product, and the question has not been answered.

Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

The Witness: Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.—

Mr. Lyon: If the Examiner please, the witness on the stand is charged with false and misleading advertising, and in view of the public interests involved in this case, I believe that he should be required to give the proportions and percentages of these various ingredients, and the manner in which they are used. I therefore insist upon an answer to the previous question.

Trial Examiner Reardon: I directed the witness to answer, and I understand on the advice of counsel—Mr. Soper, is that right—he had declined to answer.

Mr. Soper: Well, I think the record shows that the witness has declined to answer.

Trial Examiner Reardon: But you haven't advised him to decline to answer, have you? It is not on your advice, is it? [32]

Mr. Soper: Well, I think when you ask that question you place an attorney in an impossible position. Under the attorney's oath, it is his duty to protect his client at all costs,

and when you ask me that question, I have to sit here——

Trial Examiner Reardon: Yes, I will not ask you to answer it. The client has refused to answer it. Then there is nothing further to be done except to know whether you are going to take any steps by way of court procedure, Mr. Lyon, to obtain an answer to the question.

Mr. Lyon: Yes, I intend to take such proceedings, and for that reason I should like to have a short continuance of this particular case. (Whereupon the hearing was adjourned until July 18, 1941 at 10 A. M.)”

10. As is more particularly shown by the excerpts from the official record heretofore set out, the said Frederick A. Clarke has been ordered by Edward E. Reardon, trial examiner for the Federal Trade Commission in Docket 3660, to answer all relevant and pertinent questions concerning the formula for his product Bonquet Tablets, but he has refused to do so, basing his said refusal upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation. The complaint in Federal Trade Commission Docket 3660 was filed by the Federal Trade Commission in the public interest, and for the protection of the public against false and misleading advertising disseminated by this defendant. In order to properly dispose of the issues now pending be-

fore it, it is essential for the Federal Trade Commission to have full and complete information concerning the formula of defendant's product, and his refusal to testify with reference thereto in a matter involving the paramount interest of the general public, if sustained by this Court, will defeat the ends of justice and make it impossible for the Federal Trade Commission to function in the prevention of unfair and deceptive acts and practices in commerce in connection with the sale and distribution of medicinal and patent preparations where a so-called secret formula is involved.

Dated July 14, 1941.

MERLE P. LYON,

Trial Attorney, Federal Trade
Commission.

Sworn to before me this 14th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk U. S. District Court
Southern District of Cali-
fornia.

By J. M. HORN,

Deputy. [33]

“EXHIBIT A”

United States of America
Before the Federal Trade Commission

Docket No. 3660

In the Matter of Frederick A. Clarke, an individual,
trading as Boncquet Laboratories.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Frederick A. Clarke, an individual, trading as Boncquet Laboratories, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, Frederick A. Clarke, is an individual, trading and doing business under the name of Boncquet Laboratories, with his office and principal place of business located at 1416-18 South Central Avenue, Glendale, California. Respondent is now and for more than one year last past has been engaged in the business of selling and distributing a drug variously designated as “Boncquet Blood Building Tablets,” “Boncquet Hemo-Tabs” or “Boncquet Tablets.”

In the course and conduct of his said business,

respondent causes said preparation when sold to be transported from his place of business in the State of California to wholesale and retail druggists and other purchasers thereof located in various states of the United States other than the State of California, and in the District of Columbia.

Paragraph Two: In the course and conduct of his business respondent, now maintains and at all times mentioned herein has maintained a course of trade in said preparation in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of his aforesaid business the respondent has disseminated, and has caused the dissemination of, false advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondent's said preparation. Said false advertisements were and are disseminated by use of the United States mails, by insertion in newspapers, and periodicals having a general circulation, and also in circulars and other printed matter, all of which are distributed in commerce among and between the various states of the United States and in the District of Columbia. Various other means have been and are used by respondent to disseminate or cause the dissemination of said false advertisements for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase in commerce among and between the various states of the United States and in the

District of Columbia of respondent's said preparation. Among and typical of the statements and representations contained in said false advertisements so used and disseminated, as aforesaid, are the following: [34]

“New Fighting Blood in 9 Days”

“Blood Poverty Can Now Be Overcome With Boncquet Tablets. In nine days, one-third of your blood is regenerated—in little more than a week's time, you will begin to feel the results of “Boncquet Tablets”—you will ‘feel better’, more ‘alive’, more able to face the day's demands, less fatigued at night. In 30 days the blood will be entirely rebuilt and by taking Boncquet Blood Building Tablets this new blood will be rich in the fighting qualities that help defeat disease.”

“What are Boncquet (Bon Kay) Tablets? They constitute a food, not a drug. Comparatively recent scientific discoveries prove that the best blood builder is composed of these ingredients: Active Principle of Raw Liver, Vegetable Iron, Vitamins B and G, Boncquet Blood Building Tablets are guaranteed to contain the above ingredients in effective therepeutic amounts. Boncquet Tablets are scientifically processed to retain maximum Vitamins A, B, E, and G and essential minerals in their true organic colloidal form, easily assimilated and are strongly alkaline. They are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, vegetable and animal hemopocitins (blood

makers). They also contain a rich supply of milk minerals giving to the body calcium and phosphorus in their true and natural proportions as found in milk. Bonsquet Tablets are the discovery of Dr. Pierre Auguste Boncquet, internationally noted biochemist."

"Boncquet Tablets increase the number and color of your blood corpuscles. Boncquet Tablets increase the blood's energizing power, and its capacity to burn toxic poisons in the system. Your body rebuilds one-third of your blood every nine days, but if your diet lacks the essential ingredients such as are combined in Boncquet Tablets the same thin, inefficient, weak, anemic blood will be rebuilt. That is why it takes Boncquet Tablets but a short time—hardly more than a week—to improve your condition. As you continue you add new rich fighting blood. Toxic poisons are destroyed, the balance and chemical content of your system is improved, and Nature herself battles the ills that have upset you."

"Every Diseased Condition Directly or Indirectly Related to Bloodstream."

"Boncquet Tablets are designed to nourish and stimulate the bone marrow where every red blood cell is manufactured before being thrown into the blood stream. To the best of our knowledge and belief, we do not know of a single failure of Boncquet Tablets to nourish and stimulate the bone marrow, and if this is done, new red blood cells, rich in hemoglobin, are built just as surely as you

can expect power when you turn on the switch of an electric motor.”

“It is futile to treat the symptoms of any disease without first calling to your aid the most important organ of your body—your bloodstream. Nine out of ten are deficient in red blood cells and hemoglobin, but they call it by every name but the right one—Secondary Anemia. Bonquet Blood Building Tablets correct this condition.”

“Bonquet Tablets supply quickly those elements essential to rebuild to normal, thin, weak, anemic blood. By taking Bonquet Tablets you provide your system with new, rich fighting blood. In less than a month your blood is revitalized, made richer, and in most cases, brought to normal red blood cell count.” [35]

“Hemo-Tabs stimulate production of blood and increase its corpuscle-count, improve its color, and enable it to carry more oxygen to your body’s tissues. Hemo-Tablets speed up your blood’s food-burning or energizing power, enabling your system to destroy toxic poisons that mean, first a let-down, and then serious illness. Hemo-Tabs increase elimination of the by-products of digestion, thus increasing the nutritional value of the food you eat. Hemo-Tabs are prescribed by physicians, and are indicated wherever the blood stream has become unable to fight disease. Available directly from your druggist, Hemo-Tabs represent a distinct advance in man’s ability to fight his greatest enemy—disease.”

Through the use of the statements and representations hereinabove set forth, and others similar thereto not set out herein, all of which purport to be descriptive of respondent's drug and of its effectiveness in use, respondent represents that his preparation, Boncquet Blood Building Tablets, also known as Boncquet Tablets or Boncquet Hemo Tabs, is not a drug but a food; that this preparation has the power to and will regenerate the blood in 9 to 30 days; that it is a valuable aid and remedy in the treatment and cure of anemia; that this preparation is scientifically processed so as to have and retain Vitamins A, B, E and G in the maximum amounts; that this preparation is rich in organic mineral salts, digestive enzymes, glandular hormones and vegetable and animal blood makers; that this preparation assists in the formation of red blood corpuscles or hemoglobin and beneficially affects the metabolic processes of the body; that it stimulates the bone marrow and destroys toxic poisons; that this preparation is the discovery of Dr. Pierre August Boncquet, an internationally known biochemist; that a large number of bodily ailments and symptoms are due to anemia and can be cured by self-administration of respondent's preparation without the aid of diagnosis by a competent physician.

Paragraph Four: In truth and in fact respondent's preparation is not a food but a drug; it has no significant effect on the blood or the bloodstream and will not regenerate the blood. It contains no in-

gredient which has any value in the treatment of anemia, except liver, which is useful only in the treatment of pernicious anemia, and then only if given in relatively large amounts. This preparation contains Vitamins A, B, E and G in small amounts only. It is no richer in organic mineral salts, digestive enzymes, glandular hormones and vegetable and animal blood makers than any ordinary food. This preparation has no power to increase the number or affect the color of red blood corpuscles or hemoglobin and has no effect on the metabolic processes of the body. It does not increase the energizing power of the blood, nourish or stimulate the bone marrow or destroy toxic poisons. Pierre Auguste Bonquet is not a medical doctor and has no reputation whatsoever as an authority on food and nutrition. He has no connection with respondent's business whatsoever nor did he "discover" respondent's preparation. Anemia can be diagnosed only by a competent physician, and the various symptoms and ailments mentioned in respondent's advertising may or may not be the result of an anemic condition. Bonquet Tablets have no significant value in any anemic condition.

Paragraph Five: The use by respondent of the foregoing false deceptive and misleading advertisements with respect to said drug disseminated as aforesaid has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false advertise-

ments are true, and causes a substantial portion of the purchasing public because of said erroneous and mistaken belief to purchase a substantial amount of respondent's said drug. [36]

Paragraph Six: The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 8th day of December, A.D. 1938, now issues this its complaint, against said respondent.

By the Commission.

OTIS B. JOHNSON,
Secretary. [37]

“EXHIBIT B”

United States of America
Before Federal Trade Commission

Docket No. 3660

In the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories.

ANSWER

Comes now the respondent, Frederick A. Clarke, an individual, trading as Bonequet Laboratories, and for answer to complaint on file herein admits, denies and alleges as follows:

By Way of a Special and Saparate Defense Respondent Alleges:

Paragraph One: That said commission has not the jurisdiction to issue said complaint for the reason that said complaint does not state or make known to respondent how or in what manner the alleged practices of respondent are prejudicial and injurious to the public nor does said complaint state how or in what manner said practices are deceptive nor does it state how or in what manner said practices and acts are unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Said Federal Trade Commission Act was created through and by an act of Congress for the purpose of protecting the public interest in matters of unfair methods of competition in commerce.

Paragraph Two: That said commission in said complaint has failed to state or make known to respondent who are competitors of respondent, or whether, if there are any competitors, if the same are substantial competitors or respondent, nor does said complaint state whether said competitors, if there be any, are engaged in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Three: Said complaint does not state facts sufficient to establish jurisdiction in said commission to issue said complaint for the reason that there is no statement of any injury to any substantial competitor of respondent or that the alleged unfair and deceptive acts and practices in com-

merce substantially affect and involve the public interest.

Paragraph Four: That said complaint does not state facts sufficient to constitute a cause of action within the jurisdiction of said commission for the reason that said complaint does not give any specific acts of unfair and deceptive acts and practices in commerce, but that said allegations are purely conclusive.

Paragraph Five: That said complaint does not state facts sufficient to constitute a cause of action within the jurisdiction of said commission for the reason that there is no specific or substantial allegation that the issuance of said complaint is for the interest of the public.

Paragraph Six: That there is no specific allegation of a present or potential competitor. [38]

Paragraph Seven: That there is no allegation that the alleged unfair and deceptive acts and practices in commerce injuriously affect or tend to affect the public or any present or potential competitor.

Paragraph Eight: That there is no specific allegation that the alleged unfair and deceptive acts and practices in commerce tend in a substantial manner to suppress competition.

As A Further and Separate Defense Respondent Alleges:

Paragraph One: Respondent denies that said preparation is a drug, and further denies that said advertisements are false, deceptive and misleading and further denies that said advertisements have or tend to mislead or deceive a substantial or any por-

tion of the purchasing public into an erroneous and mistaken belief as to the meaning of such advertisements.

Paragraph Two: Respondent further denies the existence of any substantial competitors engaged in commerce at any of the times stated in said complaint.

Paragraph Three: Respondent further denies any injury or tendency to injure any substantial competitor and further denies that any of the alleged acts or practices set forth in said complaint are injurious and prejudicial to the public or injurious and prejudicial to any substantial competitor within the intent and meaning of said Act of Congress creating said Federal Trade Commission.

Wherefore: Respondent respectfully submits that said commission has exceeded its lawful power in instituting said proceeding and that it will exceed its lawful power in issuing any order against said respondent based upon said complaint, and respondent further prays that said complaint be dismissed on the grounds of lack of jurisdiction of the subject matter in said commission.

FREDERICK A. CLARKE,

An individual, trading as
Bonquet Laboratories,
Respondent,

By C. M. CASTRUCCIO,

His Attorney

315 West Ninth St.

Los Angeles, California.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE.

On the motion of Merle P. Lyon, attorney for the Federal Trade Commission, petitioner herein, and the affidavit of said Merle P. Lyon, verified the 14th day of July, 1941, charging contempt of court against Frederick A. Clarke, defendant herein, it is

Ordered that the said Frederick A. Clarke be and appear before the Court at 10 A. M. on the 18th day of July, 1941, to show cause, if any he has, why he should not be punished for contempt of court in refusing to obey an order of this court entered herein on May 23, 1941, ordering said Frederick A. Clarke to appear and testify before Edward E. Reardon, a trial examiner of the Federal Trade Commission in a certain proceeding pending before the said Federal Trade Commission in the matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories; as more fully appears from the motion and affidavit of Merle P. Lyon, special assistant to the Chief Counsel of the Federal Trade Commission, copies of which are hereby ordered to be served herewith.

Dated July 14, 1941.

BEN HARRISON,

District Judge. [40]

[Endorsed]: Motion, affidavit, and order to show cause for contempt of court. Filed Jul. 14, 1941.

[41]

[Title of District Court and Cause.]

DEMURRER

Comes now the Respondent, Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and demurs to the Affidavit for Order to Show Cause in re Contempt, executed by Merle P. Lyon under date of July 14, 1941, on file herein; on the following, and each of the following, grounds, to-wit:

I.

That said affidavit does not state facts sufficient to constitute a cause of contempt against the Respondent.

II.

That said Affidavit is insufficient to confer jurisdiction of the above-entitled court to try or punish the Respondent for contempt.

Wherefore, Respondent prays that this demurrer be sustained and that the contempt proceeding initiated by said Affidavit and Order to Show Cause herein, be dismissed.

ELDON V. SOPER,

Attorney for Respondent

Frederic A. Clarke.

[Endorsed]: Filed Jul. 18, 1941. [42]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE
IN RE CONTEMPT

Now Comes Frederic A. Clarke, sued herein as Frederick A. Clark, and, in answer and response to the Affidavit for Order to Show Cause in re Contempt made in this proceeding by Merle P. Lyon, dated July 14, 1941, and subscribed and sworn to by said Merle P. Lyon on said date, before R. S. Zimmerman, Clerk of the above-named Honorable Court, makes affidavit as follows, to-wit:

United States of America,
Southern District of California,
Central Division—ss.

State of California,
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

1. That your affiant is the Respondent named in that certain Order to Show Cause issued out of the above-named Honorable Court in this proceeding under date of July 14, 1941, by Honorable Ben Harrison, a Judge of said Court; that your affiant is the same person as Frederick A. Clark who is named in said Order to Show Cause as the Defendant and Respondent herein; [43]

2. That your affiant has read the affidavit made in this proceeding by Merle P. Lyon, dated July 14, 1941, and which was subscribed and sworn to by said

Merle P. Lyon on said last mentioned date before R. S. Zimmerman, Clerk of the above named Honorable Court; That said affidavit does not states facts sufficient to constitute a cause of contempt against your affiant.

3. That in connection with paragraph No. "3". in said affidavit your affiant admits that on July 20, 1939, and on June 13, 1940, your affiant appeared before Examiners for the Federal Trade Commission in response to subpoenas in the proceeding then and now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual trading as Bonequet Laboratories, Docket No. 3660; that it is not true, as set forth in said affidavit, that your affiant then "refused to answer any and all questions propounded to him by counsel" for the Federal Trade Commission; that your affiant did then refuse to answer certain questions propounded to him by counsel for the Federal Trade Commission, and that your affiant did so upon the advice of his attorney; that said attorney had then, prior to each of said dates, informed your affiant, and your affiant then believed, that the questions then propounded to your affiant and which your affiant then refused to answer were incompetent, irrelevant and immaterial, and that the Federal Trade Commission had no jurisdiction over your affiant or his business, hereinafter named;

4. That in connection with paragraph No. "4" in said affidavit, your affiant admits that on May 23, 1941, a purported Order was made herein; that said

purported Order was made pursuant to a petition in writing entitled "Application for an Order Requiring the Giving of Evidence"; that said petition is on file with the Clerk of this Court and reference thereto is hereby made for further particulars; that your affiant is not, and never has been guilty of contumacy or refusal to obey a subpoena issued to your affiant to appear before the Federal Trade Commission; that your [44] affiant is informed by his attorney, Eldon V. Soper, and believes and so states, that said purported Order is void as in excess of jurisdiction;

5. That it is true as alleged in paragraph No. "7." of said affidavit that your affiant did not appear before Edward E. Reardon, an Examiner of the Federal Trade Commission, on the 4th day of June, 1941; that at said time your affiant was ill and under the care of his physician and confined to his bed and was unable to attend such hearing without danger to his health in response to that certain purported Order Compelling Obedience to Subpoena issued out of the above-named Honorable Court in this proceeding under date of May 23, 1941, by Honorable Paul J. McCormick, a Judge of said Court;

6. That at the time and place referred to in said purported Order, Eldon V. Soper, Esquire, appeared for and on behalf of your affiant and as your affiant's attorney, and presented to said Edward E. Reardon, as such Examiner, a physician's certificate in writing showing that your affiant was then ill and under the care of his physician and unable to at-

tend such hearing without danger to his health, that prior to said 4th day of June, 1941, your affiant had retained said Eldon V. Soper as his attorney in the place and stead of Messrs. Canepa and Castruccio, attorneys at law, who had theretofore appeared for your affiant in the above mentioned proceeding before the Federal Trade Commission;

7. That in connection with paragraph No. "8." of said affidavit your affiant denies the inferential allegation appearing therein that the purported Order entered herein on May 23, 1941, compelled your affiant "to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the pending matter before the Federal Trade Commission";

8. That in connection with paragraph No. "9." of said affidavit your affiant denies that on July 7, 1941, before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, your affiant [45] "refused to answer certain relevant and proper questions propounded to him by counsel for the Federal Trade Commission pertaining to the formula, composition, and ingredients of his product known as Bonequet Tablets or Bonequet Blood Building Tablets"; that none of the questions then propounded to your affiant by counsel for the Federal Trade Commission and which your affiant then refused to answer were or are competent, relevant, material, proper, or in the interests of justice; that your affiant then answered all questions propounded to him by counsel for the Federal Trade Commis-

sion except questions dealing with the quantitative amounts of the ingredients used by your affiant in the manufacture of his product, Bonequet Tablets; that your affiant then disclosed to counsel for the Federal Trade Commission the names of all ingredients used in his said product; that your affiant then gave the names of the manufacturers of said ingredients or the sources from which said ingredients are derived; that it is not true, as set forth in said affidavit, that "the questions and answers material in this connection appear at page 330 et seq. of the official transcript of the record in Docket 3660", nor that all the questions and answers material in said connection are set forth in said affidavit; that all the questions and answers dealing with the formula used by affiant in his business, hereinafter named, appear on page 327, line 9, at page 350, line 5, of said official transcript; that a full, true, and correct copy of that portion of said official transcript is attached hereto, marked Exhibit "A", and by this reference made a part hereof;

9. That in connection with paragraph No. "10." of said affidavit, your affiant denies that it is shown by the excerpts from the official record set out in said affidavit that your affiant refused to answer relevant and pertinent questions concerning the formula for his product, Bonequet Tablets; that it is true as set forth therein that your affiant refused to answer certain questions [46] then asked; that it is not true as set forth therein that your affiant

based his refusal to answer said questions "upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation", nor upon any excuse or pretext whatsoever; that your affiant did base his refusal to so testify upon the ground that said questions would require him to divulge trade secrets, and that in the event of such disclosure irreparable damage and injury to your affiant's said business would result; that the inferential allegation appearing therein that your affiant has disseminated false and misleading advertising is untrue; that it is not true as set forth therein that "in order to properly dispose of the issues now pending before it, it is essential for the Federal Trade Commission to have full and complete information concerning the formula" of your affiant's product; that the only information it is essential for the Federal Trade Commission to have in connection with the formula of your affiant's product has already been testified to by your affiant; that the inferential allegation appearing therein that your affiant has refused to testify with reference to said formula is untrue; that the only refusal of your affiant to testify with reference thereto is as stated hereinabove; that it is not true as set forth in said paragraph that if this Court sustains your affiant in refusing to divulge his trade secrets that this "will defeat the ends of justice and make it impossible for the Federal Trade Commission to function in the prevention of unfair and

deceptive acts and practices in commerce in connection with the sale and distribution of medicinal and patent prescriptions where a so-called secret formula is involved”;

10. That your affiant commenced doing business under the firm name and style of Boncquet Laboratories, at Glendale, California, on April 1, 1937; that on or about April 1, 1937, your affiant executed and filed with the County Clerk of the County of [47] Los Angeles, State of California, a certificate pursuant to the provisions of Section 2466 of the Civil Code of the State of California, in which certificate was set forth that affiant was doing business in the County of Los Angeles, State of California, as an individual under the firm name and style of Boncquet Laboratories, and stated the name in full of affiant as the owner and proprietor of the said business, and his place of residence; that affiant caused such certificate to be published once a week for four successive weeks in a newspaper published in said County of Los Angeles, State of California, as required by said Section 2466, and caused an Affidavit showing the publication of such certificate to be filed with the County Clerk of said County within thirty days after the completion of such publication;

11. That ever since the 1st day of April, 1937, your affiant has done business at Glendale, California, under the firm name and style of Boncquet Laboratories, and has conducted and operated the same individually and as sole owner and proprietor thereof;

12. That since your affiant commenced doing business as aforesaid your affiant did, to and including July 11, 1941, a net business to date of Three Hundred Four Thousand Seven Hundred Fifty and 01/100 Dollars (\$304,750.01), all of which has been derived from the sale of affiant's product, Boncquet Tablets; that during said time your affiant has spent the sum of One Hundred Fifteen Thousand Twenty-three and 42/100 Dollars (\$115,023.42) in advertising his said product, Boncquet Tablets; that due to the exceptional merit of your affiant's product, Boncquet Tablets, and because of the advertising done by your affiant as aforesaid, your affiant has created a valuable good will for his said business and product;

13. That in the manufacture of Boncquet Tablets your affiant uses Raw Liver Principle Extractive (Red blood cell maturing factor); that the raw liver principle is the discovery for which the Nobel [48] Prize for Medicine was awarded to Doctors Whipple, Minor and Murphy in 1935; that in addition to said Raw Liver Principle Extractive, which is an animal hemopoietin or blood builder, your affiant uses in the manufacture of Boncquet Tablets the following, and only the following, ingredients; dehydrated vegetable parsley concentrate, pure dried brewers' grain yeast, vitamin B-1, riboflavin (vitamin G or B-2), pure dehydrated milk whey, and dextrose; that each and all of said additional ingredients, except the dextrose, is a hemopoietin or blood builder; that a hemopoietic substance or blood

builder is a substance which, in combination with other hemopoietic substances, increases the red blood cell count and hemoglobin; that the combination of the said ingredients used by your affiant in the manufacture of Bonequet Tablets substantially increases and supplements the blood building qualities of the Raw Liver Principle Extractive so used by your affiant; that the dextrose used by your affiant in the manufacture of Bonequet Tablets is used only as a binder in order to promote cohesion in the tablets; that only sufficient dextrose is so used as to accomplish this result;

14. That your affiant owns the formula for said Bonequet Tablets; that the quantitative amounts of the ingredients used by your affiant in the manufacture of Bonequet Tablets are valuable trade secrets; that the formula used by your affiant in the manufacture of his said products has not been reduced to writing; that affiant has no patent for said formula, and that said formula is not patentable under the laws of the United States of America;

15. That in the event your affiant discloses the quantitative amounts of the ingredients used by your affiant in the manufacture of his said product, other persons could imitate your affiant's product; that your affiant is informed and believes, and on that basis alleges, that in the event your affiant did disclose the quantitative amounts of the ingredients used by your affiant in the manufacture of his said product that other persons would attempt to [49] simulate said product and to injure and destroy

your affiant's business and the good will thereof; that your affiant is informed by his attorney, Eldon V. Soper, and believes and so states, that Merle P. Lyon, attorney of record herein for the Federal Trade Commission, stated to said Eldon V. Soper on July 17, 1941, that if your affiant discloses the quantitative amounts of the ingredients in your affiant's said formula to the Federal Trade Commission in the proceeding now pending against your affiant before said Commission that said Commission will then disclose said quantitative amounts to others, and that said Merle P. Lyon was then obtaining witnesses for that purpose; that heretofore in said last mentioned proceeding one Pierre Auguste Boncquet testified as to the contents of a certain formula; that thereafter said Commission disclosed said formula to Dr. B. O. Raulston; that said formula was not nor is not affiant's formula; that the truth or falsity of all or any of the statements and claims made by your affiant in his advertising cannot be determined by disclosure of said quantitative amounts; that said Commission intends, if it obtains such information, to disclose it to others; that if said Commission obtains such information the same will be and become public property; that in the event the quantitative amounts of the ingredients in your affiant's said formula become public property that your affiant's business will be irreparably injured and destroyed;

16. That the efficacy of your affiant's product, Boncquet Tablets, has been demonstrated over a

period of more than four (4) years and by numerous blood counts of individuals taken before and after the use of Boncquet Tablets; that the truth of the statements and claims made by your affiant is his advertising can be demonstrated by eminent scientific authority and by blood counts which furnish incontestable proof of the merit of Boncquet Tablets; that these facts can be demonstrated to the Federal Trade Commission through blood counts without compelling your affiant to disclose [50] the quantitative amounts of the ingredients used by your affiant in the manufacture of Boncquet Tablets; that your affiant has offered such proof to the Federal Trade Commission and that such offer has been refused to date;

17. That your affiant has not used, and is not using, any unfair method of competition in commerce, or any unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act, Act of September 16, 1914, C. 311, 38 Stat. 717, or as amended by Public—No. 447—75th Congress, 3d. Session, S.1077, approved and effective March 21, 1938 (U. S. Code, title 15, Sec. 41, et seq.) or otherwise; that the Federal Trade Commission has no jurisdiction over your affiant or his said business; that your affiant has not divulged any of the provisions of the Federal Trade Commission Act;

18. That by reason of the facts set forth hereinabove disclosure of the quantitative amounts of the

ingredients used in your affiant's said formula is not in the interests of justice;

Wherefore, Affiant prays that the contempt proceeding initiated by said Affidavit and Order to Show Cause be dismissed, and that your affiant, Frederic A. Clarke, be discharged therefrom.

FREDERIC A. CLARKE

Subscribed and sworn to before me, this 18 day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of California

By J. M. HORN

Deputy Clerk. [51]

EXHIBIT "A"

Trial Examiner Reardon: Why don't you say: What was the composition of the tablets?

Mr. Lyon: Yes, all right.

By Mr. Lyon:

Q. What was the composition of the tablets?

A. In substance just about what we have now in our formula, which is printed right on our label.

Q. And what is that formula?

Trial Examiner Reardon: Well, a label declaration is not always a formula, of course. It may be a part of a formula. It is not required to put the entire formula on the label.

The Witness: I think it is entirely right though, under the law, Mr. Examiner, that everyone be compelled to show their ingredients right on the label.

Trial Examiner Reardon: Oh, there is no question about that, but I am only saying that I have had so much experience that I know that a label declaration does not require the full formula to be shown.

The Witness: Well, you couldn't, because——

Mr. Soper: We don't need to go into that.

Mr. Lyon: Let's not go into the argument.

Trial Examiner Reardon: I think we are talking about two different things. You are asking for the formula and he is talking about the label declaration.

Mr. Lyon: That is right.

Trial Examiner Reardon: I want to know what you want. [52]

Mr. Lyon: I want the formula. I don't care about the label declaration.

Mr. Soper: If that is the precise question, as to the entire formula, I want to interpose an objection, because I don't think that is a proper question. As I understand it, the claim is that there is misleading advertising here, and Mr. Lyon has stated to me that there is a question as to whether or not the product contains liver extract. Now, it seems to me that could be reached without forcing Mr. Clarke to disclose his entire formula, and I want to enter an objection.

Trial Examiner Reardon: Name the product you

mean and base your question on the product, and let's go ahead. I understand there were several products involved.

Mr. Lyon: Oh, no. There is only one product.

By Mr. Lyon:

Q. Isn't that right, Mr. Clarke? You are making just the one product? A. That is right.

Q. And you have always made just the one product, since April 1, 1937; is that correct? What was the answer to that?

A. Let me have that question again.
(The question was read.)

A. In substance, yes.

Q. And that is the bonequet Tablets?

A. Yes.

Trial Examiner Reardon: The product has had the same name? That is what Mr. Lyon refers to in his question. You have made the same product?

The Witness: Yes.

Trial Examiner Reardon: And you have sold the product under the same name? [53]

The Witness: Bonequet Tablets.

Trial Examiner Reardon: That is the question.

By Mr. Lyon:

Q. But you did change the formula from the one used by the corporation; is that correct?

A. Oh, yes.

Q. And was this formula originated by you or by someone else?

Mr. Soper: By "formula," you are referring to——

Mr. Lyon: The new one.

Trial Examiner Reardon: He just said he sold this product which is named since that time, 1937. Now, the question is: What is the formula?

Isn't that what you are asking?

Mr. Lyon: Yes. There was objection to it.

Mr. Soper: Now, if the question now pending is as to the contents of the formula, I wish to renew my objection at this time.

Trial Examiner Reardon: Just read the question pending.

(The record was read).

Trial Examiner Reardon: Well, the question is, Mr. Clarke, what is the formula of that product that you produced since some time in 1937, which you gave the date for?

The Witness: Well, one——

Trial Examiner Reardon: There is an objection to that, is there?

Mr. Soper: Yes, there is an objection.

Mr. Lyon: What is the ruling on it?

Trial Examiner Reardon: What would be the grounds for the objection, if you would like to state them on the record?

Mr. Soper: Yes. The objection is this: That, as I understand, the only claim made by the Commission is that the product manufactured by Mr. Clarke may not contain the liver, liver extract, and he exhibited to me a couple of analyses made for the Commission [54] by Government officials, and while the examination indicated that there was—at least

one of those examinations indicated that there was liver present, they were unable to ascertain what the liver content was. Now, if the only question is as to the liver content, as to whether or not it contains liver, it seems to me that question could be answered categorically.

Trial Examiner Reardon: Well, the question at the present time is what the stenographer will read, and I will overrule the objection, and that will settle the question about the liver and whether it is there or not.

Mr. Soper: Of course, it does that, but it also compels him to disclose the formula.

Trial Examiner Reardon: I can only go according to the question and rule on the question.

Will you read the question?

(The question was read.)

The Witness: Well, it consists of, one, Raw liver principal extracted——

Trial Examiner Reardon: Does it state the quantity?

The Witness: No, it doesn't. In paranthesis, "(Red blood cell maturing factor)."

By Mr. Lyon:

Q. What was that last part again?

A. "(Red blood cell maturing factor)."

Q. Maturing?

A. Yes. That is a description for the raw liver principal extract.

"2. Dehydrated vegetable parsley concentrate."

Q. Parsley?

A. Parsley, p-a-r-s-l-e-y, concentrate.

“3. Pure dried brewers’ grain yeast.

“4. Vitamin B-1. [55]

“5. Riboflavin,”

and then in parenthesis,

“(Vitamin G or B-2).

“6. Pure dehydrated milk whey.

“7. Dextrose, as a binder.”

Trial Examiner Reardon: Those are all the ingredients?

The Witness: That is right.

Trial Examiner Reardon: But that does not state the formula. The formula calls for the quantities.

By Mr. Lyon:

Q. Yes, what are the proportions of those different ingredients?

A. Of course, that is my trade secret.

Trial Examiner Reardon: Do you object?

Mr. Soper: Yes, I do.

Trial Examiner Reardon: I will have to overrule the objection and direct the witness to answer.

The Witness: Well, I would be divulging all my trade secrets.

Trial Examiner Reardon: I know that, but I can’t help that. I have to direct you to answer. You are selling the product, and we are entitled to know.

The Witness: Well, I decline to answer, to divulge this trade secret.

Mr. Soper: As I understand it, Mr. Clarke, you

are not unwilling to let the Commission know that you actually use liver?

The Witness: Oh, no. No, I can show you bills for thousands of dollars from the Swift Company, showing that I used liver, and I am not buying liver just to go out and throw it away and just to tell the Federal Trade Commission.

Trial Examiner Reardon: That isn't the point. The point is that the question calls for the formula, and you have only named the ingredients, without naming the amounts, proportionate amounts, [56] that are used in constructing the product, and the question has not been answered.

Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

The Witness: Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.

I don't mind—well, Mr. Examiner, I might state that due to the information that I have published about this as a blood builder, I already have a very serious competition that is imitating my product.

Trial Examiner Reardon: Has any formula been admitted into evidence here that has been analyzed,—of this product?

Mr. Lyon: Yes.

Trial Examiner Reardon: Has there been any analysis introduced in evidence here?

Mr. Lyon: Yes.

Trial Examiner Reardon: Show the witness the

analysis and ask him if that is the analysis of the product, as produced and sold by him since the date of 1937 that he has stated.

Mr. Lyon: Yes.

By Mr. Lyon:

Q. Will you look at Commission's Exhibit 19-A and 19-B, Mr. Clarke, being an analysis made by the Food & Drug Administration of the United States.

Mr. Soper: Are these in evidence.

Mr. Lyon: Yes, they are, as Commission's Exhibit 19-A and B.

The Witness: Haven't you a copy of the brief wherein they state that—they indicate that the liver principal is in the product?

Mr. Lyon: Well, the brief——

Trial Examiner Reardon: That is not the point. Off the [57] record, a moment.

(Discussion off the record).

Trial Examiner Reardon: On the record. I direct you to answer.

The Witness: I refuse to answer, because it would just put me out of business.

Trial Examiner Reardon: Have you any further questions, outside of the formula?

Mr. Lyon: Before I take further proceeding in this matter, I would like to ask Mr. Clarke a few questions relative to each of these ingredients, without going into the proportions,——

Trial Examiner Reardon: All right.

Mr. Lyon: —and get that clear for the record,

so that we will know what we are talking about when we talk about these different ingredients.

Trial Examiner Reardon: All right.

By Mr. Lyon:

Q. You spoke about using the principal, raw liver principal extract.

A. I haven't a picture of the machinery here, but you have it in the original folder, which we no longer use. I would like to show the Examiner a picture of the battery of machinery.

Trial Examiner Reardon: Of course, I will see that later on, all these exhibits here.

The Witness: It is very important, so far as I am concerned.

Here it is (indicating). You see, this is stainless steel equipment, and we have worked out a method of going after this factor from Raw liver.

Trial Examiner Reardon: We will not ask you to disclose how you get this factor out of the liver.

[58]

The Witness: I don't mind telling you. The only thing I know is that we, from this raw liver that we obtain from Swift, and we already have Federal exemption from meat inspection, and this liver is delivered to us without anyone touching it, that is, the pluck is taken right out of the carcass and the liver is cut away and certain other of the endocrines, and is delivered to us, you might say, intact, so that we get the full benefit of it, and we take it and we digest it, and then we pull it through dicallite, which is even a finer clay than Fuller's Earth,

and by a vacuum process we extract about 91½ to 101½ per cent of this liver factor. The rest we wash down a sump hole. We combine this with the other ingredients, and we know by literally thousands of scientific tests——

By Mr. Lyon:

Q. Just a minute. You take this raw liver and run it through these machines, and it comes out in the form of liver extract; is that right?

A. That is right. This factor, of course, it is.

Q. Then you call it a red blood cell maturing factor?

A. That is the correct name for it. Kracke calls it that, who is our highest authority on blood, I think, in the United States. He calls it the raw liver principal, and so does Hayden of the Creel Institute at Cleveland, calls it the raw liver principal.

Q. And it is commonly called liver extract?

A. No.

Q. It is liver?

A. It is liver, absolutely.

Q. It is not the raw liver?

A. It is raw liver. We use heat, but we never go above body temperature, and we heat it by electricity. This results [59] in a very uniform type of heating. That is, we haven't got gas, which may go up and down. Electricity is constant, and when we get this factor we know that we have discovered the secret of extracting this particular principal that unquestionably makes it the greatest blood builder that is sold to the public today.

Trial Examiner Reardon: I don't think that counsel is interested in the secret method of extracting it, but in the result. What is the thing that you put in that ingredient which is extracted? What is it, and how much?

By Mr. Lyon:

Q. It is liver extract?

A. Call it the Raw Liver Principal, because your Government doctors know what I am talking about.

Trial Examiner Reardon: What proportion of the entire product does that consist of?

The Witness: That is what I don't want to divulge.

By Mr. Lyon:

Q. You claim your trade secret is the method in which you make this raw liver principal?

A. That is right.

Q. Or the proportion in which you mix it up?

A. The way I mix it with the other ingredients, which make it a remarkable blood builder.

Q. I am not asking you how it builds up. I am asking you just what proportions you use.

A. I don't want to tell the proportions, because, you see, all these other things are blood building powers——

Q. Do you claim that the proportion itself would be a trade secret?

A. Oh, absolutely. You see, Mr. Lyon, here—do you want to put this off the record?

Mr. Lyon: Off the record.

Trial Examiner Reardon: This is off the record.

(Discussion off the record) [60]

Trial Examiner Reardon: On the record.

By Mr. Lyon:

Q. Now, Mr. Clarke, you said that the second ingredient that you use was the dehydrated vegetable parsley concentrate? A. That is right.

Q. Just what do you mean by that?

A. Well, we purchase from a group that take parsley beds out at El Monte, and they fertilize these parsley beds to the extent of about five or six thousand pounds of fertilizer, way out of proportion from what you would use if you were just going to raise parsley, and so we have found that the parsley concentrates that we use will carry about from three to four hundred per cent more chlorophyll, and, of course, the natural vitamins and the minerals, and all those are very efficacious for blood building, because they have——

Q. Just a minute, Mr. Clarke. Don't go into the argument about how efficacious it is, but tell me what the concentrate is. Is it the same as ground parsley? A. Oh, no.

Q. Or pulverized?

A. Oh, yes, it is a very fine powder.

Q. You take the common vegetable parsley and pulverize it?

Trial Examiner Reardon: The question isn't whether he does. The question is how much.

By Mr. Lyon:

Q. You refuse to tell me how much is in it?

A. Yes.

Q. That is a part of the so-called trade secret?

A. I wouldn't say "so-called." It is a trade secret.

Q. You claim that to be a trade secret?

A. Yes. [61]

Q. This third ingredient you spoke of was just dried brewers' yeast? A. Yes.

Q. What is that?

A. That is from the Anheuser-Busch Company of St. Louis. They have developed a strain G-yeast, which we purchase from them, that has about the highest natural vitamin B-1 units of any yeast that is manufactured.

You see we just do business with Anheuser-Busch, and we have entree to their laboratories.

Trial Examiner Reardon: That is all right.

By Mr. Lyon:

Q. You get the yeast and mix it up with your other ingredients? A. That is right.

Q. Now, you spoke also about vitamin B-1.

A. Of course, there is the natural B-1 in——

Q. Do you mean by that the vitamin B-1, as included in some of these other ingredients, or by itself? A. Yes.

Q. As a pristine product? A. Yes.

Trial Examiner Reardon: You don't add the crystalline B-1?

The Witness: Oh, yes, we do.

Trial Examiner Reardon: That is, you add B-1 that comes in crystals?

The Witness: Yes. We get that from the Merck Company.

Mr. Soper: You don't have to tell from whom you get this stuff.

The Witness: I don't mind.

Mr. Soper: All they want to know is what it is.

The Witness: What we do is to do business with the [62] finest companies there are.

By Mr. Lyon:

Q. That vitamin B-1 then is in the form of crystals? A. Pure crystalline vitamin B-1.

Q. And that you obtain from a wholesale drug company? A. That is right.

Q. And it is mixed then with the other ingredients?

A. That we do that, Mr. Lyon, in order to get the best results.

Q. Regardless of why you do it.

A. I want to see that the individual who takes this is protected.

Trial Examiner Reardon: We are not going into that question.

By Mr. Lyon:

Q. We are not going into the efficacy of it at this time. Now, you also spoke about riboflavin—

A. Riboflavin.

Q. —as an ingredient. Just what is that, Mr. Clarke?

A. Well, riboflavin is really vitamin G or B-2, and it is a scientific fact that liver contains riboflavin; in fact, it is the finest sort of riboflavin.

Q. What form is it in?

A. It is in the form of an active ingredient.

Trial Examiner Reardon: Do you buy it in the form in which you put it in?

The Witness: No. It is in the liver.

Trial Examiner Reardon: It is in the liver?

The Witness: But you have a right to make that claim.

By Mr. Lyon:

Q. It is in the liver itself?

A. It is in the liver itself. [63]

Q. But it is something you have listed as an ingredient?

A. I want to clarify that. You said not to use the name of the company, but we also buy the B-2 from the Merck Company.

Trial Examiner Reardon: This riboflavin?

The Witness: That is what we call it.

Trial Examiner Reardon: You buy riboflavin from them?

The Witness: That is right.

Trial Examiner Reardon: That comes in crystal form?

The Witness: In crystal.

Trial Examiner Reardon: In the B-2?

The Witness: In the B-2.

Trial Examiner Reardon: Then do you buy the product, riboflavin, in crystal form?

The Witness: That is right.

Mr. Soper: It is also contained in the liver, as I understand it?

The Witness: Oh, yes, in very big quantities in liver.

By Mr. Lyon:

Q. But you also get it in crystalline form and add it to the other ingredients; is that correct?

A. That is right.

Q. Now, the pure dehydrated milk whey that you spoke about,—what is that?

A. That is the finest milk whey that we can buy, and we get that from the Tillima Cheese Company.

Trial Examiner Reardon: It doesn't make any difference where you get it. Milk whey is an ordinary substance. What is the quantity of it that you use?

The Witness: Of course, I don't want to tell the quantity.

By Mr. Lyon: [64]

Q. You refuse to give the quantity that you use? Is that correct? You claim that to be a part of a trade secret?

A. Absolutely.

Q. Now, you spoke about dextrose, Mr. Clarke.

A. As a binder; dextrose, as a binder.

Q. It is used only as a binder?

A. Yes.

Trial Examiner Reardon: What is the quantity of the dextrose?

By Mr. Lyon:

Q. What is the quantity?

A. Sufficient to bind the tablet.

Q. And you refuse to give the amount or the proportion of dextrose that you use?

A. Oh, yes. I am not selling dextrose. I am selling a blood builder, you see.

Mr. Lyon: If the Examiner, please, the witness on the stand is charged with false and misleading advertising, and in view of the public interests involved in this case, I believe that he should be required to give the proportions and percentages of these various ingredients, and the manner in which they are used. I therefore insist upon an answer to the previous question.

Trial Examiner Reardon: I directed the witness to answer, and I understand on the advice of counsel—Mr. Soper, is that right—he has declined to answer?

Mr. Soper: Well, I think the record shows that the witness has declined to answer.

Trial Examiner Reardon: But you haven't advised him to decline to answer, have you? It is not on your advice, is it?

Mr. Soper: Well, I think when you ask that question you place an attorney in an impossible position. Under the attorney's oath, it is his duty to protect his client at all costs, [65] and when you ask me that question, I have to sit here——

Trial Examiner Reardon: Yes, I will not ask you to answer it. The client has refused to answer it. Then there is nothing further to be done except to know whether you are going to take any steps by way of court procedure, Mr. Lyon, to obtain an answer to the question.

Mr. Lyon: Yes. I intend to take such proceedings, and for that reason I should like to have a short continuance of this particular case.

Trial Examiner Reardon: The question then comes to what time will we adjourn it here, for the purpose of your application to the court?

Mr. Soper: I wonder if, before there is any adjournment, I could have the opportunity to ask a couple questions?

Trial Examiner Reardon: Oh, yes, Mr. Soper.

Mr. Soper: It is possible that some light might be thrown on the matter.

Trial Examiner Reardon: Oh, yes, Mr. Soper.

Cross Examination

By Mr. Soper:

Q. Mr. Clarke, it is true, is it not, that the addition of other things to the liver extract increases the therapeutic value of the liver extract itself?

A. Very much so.

Q. And with the exception of the dextrose used as a binder, do the other ingredients used in your product, in addition to the liver extract, all tend to increase its therapeutic value?

A. Very much so.

Q. In other words, it is the combination of these various ingredients which gives your product its peculiar efficacy; is that correct?

A. I would say uniqueness, because it is a very unique [66] formula, not questioned by any scientific men—

Mr. Lyon: Just a minute. I object to the last statement.

Trial Examiner Reardon: That may be stricken, —not questioned by any scientific men.

Mr. Soper: Just the last part there, I take it?

Trial Examiner Reardon: Yes. "Not questioned by any scientific men," those words, may be stricken.

Mr. Soper: That is all at this time.

Trial Examiner Reardon: All right.

The Witness: But I am willing to supply you with scientific tests——

Trial Examiner Reardon: No. That is not called for at the present time.

Mr. Lyon: Mr. Soper, you have no further questions?

Mr. Soper: No. Here is the thing that occurs to me——

Trial Examiner Reardon: Let's go off the record.

Mr. Soper: We might as well.

Trial Examiner Reardon: Off the record.

(Discussion off the record)

Trial Examiner Reardon: On the record.

Redirect Examination

By Mr. Lyon:

Q. Mr. Clarke, I want to ask you this: If you could be assured that your statements with reference to the various proportions of these ingredients would not become public property, but would be kept secret by the Commission for only their own personal use——

A. You couldn't do that.

Q. —would you be willing to state them?

A. You couldn't do that. No. [67]

Q. If we assured you they would be kept in confidence?

A. You couldn't assure me of that, because in five or six years, some other clerk might have access to that file, and he would divulge it.

Now, if it is the American way to put me out of business because I won't divulge my trade secret, why, I am willing to go out of business, because I can make a living very easily in other ways.

Q. You understand, Mr. Clarke, we are trying to represent the public here, trying to protect them from false and misleading advertising,—

A. All right.

Q. —and that the Commission itself has no personal interest, one way or the other, except to protect the public?

A. I feel that. I know that.

Q. And that is all we care about, and we don't want to give any benefit or advantage to your competitors.

A. That is right. On the other hand, I always understood that the Federal Trade Commission had to have an injured competitor. Is that true?

Q. That is not true under the present law.

A. I see. I thought they had. Dr. Bonquet is the one that instituted this. He is the one that instituted these proceedings against me.

Mr. Lyon: There is no question of any injury to competitors involved here at all.

Trial Examiner Reardon: Now, wait a minute. This is off the record.

(Discussion off the record).

Mr. Lyon: That is all.

Mr. Soper: That is all. [68]

Trial Examiner Reardon: The hearing is now, at 11:45 o'clock a. m., Pacific Standard time, adjourned to be reconvened at 10:00 o'clock a. m., Pacific Standard time, on the 18th day of July, 1941, in Room 333-F, United States Post Office Building, at Los Angeles, California.

(Whereupon, at 11:45 o'clock a. m., July 7, 1941, the hearing was adjourned until July 18, 1941, at 10:00 o'clock A.M.)

[Endorsed]: Filed Jul. 18, 1941. [69]

[Title of Cause.]

ORDER

This matter came on this day to be heard upon the order heretofore issued on July 14, 1941 against the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on May 23, 1941, ordering said defendant to appear and testify before the duly appointed trial examiner of the Federal Trade Commission in a certain matter now pending before the Federal Trade Commission entitled In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, FTC Docket No. 3660;

It further appearing to the court from the motion and affidavit of Merle P. Lyon, special assistant to W. T. Kelley, Chief Counsel of the Federal Trade Commission filed in support of said order to show cause, and from the counter-affidavit of Eldon V. Soper, counsel for the defendant, and after a hearing upon said motion, affidavit, and counter-affidavit, and after arguments of counsel, and upon full consideration thereof, that the defendant Frederick A. Clarke is guilty of contempt of this court in refusing to obey the order of this court entered May 23, 1941, in refusing to answer lawful and relevant questions propounded to him on July 7, 1941 at a hearing held before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660 FTC; and that said defendant was not privileged as a matter of law to refuse to answer said questions on the ground that to do so would disclose a trade secret; and it further appearing to the court that said defendant should be afforded an opportunity to purge himself of contempt by again appearing before the trial examiner [70] of the Federal Trade Commission and answering the questions which he has heretofore refused to answer;

It is Ordered that the defendant Frederick A. Clarke be and appear as a witness at a hearing to be held on July 22, 1941 at 2. p. m. in Room 229, Post Office Building, Los Angeles, California

in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660 FTC, and that said defendant then and there answer the question, "What are the proportions of the different ingredients in the product Boncquet Tablets?", and to answer any and all other relevant and proper questions respecting the quantitative formula for his product Boncquet Tablets.

July 18, 1941.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Jul. 28, 1941. [71]

[Title of Cause.]

NOTICE OF MOTION

Mr. Frederick A. Clarke,
1418 S. Glendale Ave.
Glendale, California.

Please Take Notice that on Monday, July 28, 1941, at 10:00 A. M., or as soon thereafter as counsel can be heard, I shall present to Judge Benjamin Harrison, Presiding Judge of the District Court of the United States for the Southern District of California, in the court room commonly occupied by him in the Post Office Building, Los Angeles, California, a petition (copy of which is hereto attached and served upon you), and shall pray for the entry of an order adjudging you in contempt of court and fixing your punishment

therefor in the manner and form to be then and there fixed by the court; at which time and place you may appear if you see fit.

MERLE P. LYON,

Special Assistant to the Chief
Counsel, Federal Trade
Commission.

State of California,
County of Los Angeles—ss.

Merle P. Lyon, being first duly sworn, deposes and says that he served the foregoing notice by delivering a copy thereof together with a copy of the petition therein referred to personally to Frederick A. Clarke on July 25, 1941, at 9:55 A. M.

MERLE P. LYON

Subscribed and sworn to before me, this 25th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of California,

By FRANCIS E. CROSS,
Deputy.

[Endorsed]: Filed Jul. 28, 1941. [72]

[Title of Cause.]

PETITION FOR ORDER ADJUDGING
DEFENDANT IN CONTEMPT

Now comes the Federal Trade Commission, petitioner in the above entitled matter, by Merle P. Lyon, Special Assistant to W. T. Kelley, Chief Counsel of the said Federal Trade Commission, and respectfully shows unto the court as follows:

1. On July 14, 1941, pursuant to a motion supported by affidavit filed herein, an order was entered in the above entitled matter ordering the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court for refusing to obey an order of this court entered May 23, 1941, ordering and directing the said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Federal Trade Commission Docket No. 3660.

2. Pursuant to said order of July 14, 1941, a hearing on said order to show cause was duly had on July 18, 1941 before Presiding District Judge Benjamin Harrison; that said court thereupon rendered his opinion holding that the defendant was not privileged to refuse to answer the questions which he had been asked and refused to answer at a hearing held July 7, 1941 in the Matter of Frederick A. Clarke, an individual trading as Bonequet Laboratories, Docket No. 3660 before a

trial examiner of the Federal Trade Commission; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative formula for his product Bonquet Tablets; and that his refusal to do so was in contempt of this court. The court thereupon ordered the defendant Frederick A. Clarke to appear on July 22, 1941 at 2. p. m. in the Post Office Building, Los Angeles, California before the duly appointed trial examiner of the Federal Trade Commission, [73] and then and there to answer the questions relative to the quantitative formula for his product Bonquet Tablets which he had on July 7, 1941 been asked and which he had then refused to answer on the ground that said questions compelled the disclosure of a trade secret. This court in particular ordered said defendant to answer the question, "What are the proportions of the different ingredients in Bonquet Tablets?"

3. Your petitioner further shows unto the court that on July 22, 1941, the said defendant Frederick A. Clarke appeared at the time and place above set forth, but refused to answer said questions or to disclose his quantitative formula for his product Bonquet Tablets; all of which will appear from the official transcript of said Federal Trade Commission hearing, the pertinent excerpts from which are as follows:

"Q. Mr. Clarke, so far I have tried to keep off of controversial ground, and I now come

to the point that was raised before the District Court for the Southern District of California in the contempt proceeding instituted against you in the matter entitled; Federal Trade Commission vs. Frederick A. Clarke, No. 1553; and I call upon you now for the quantitative formula for your product, Bonquet Tablets, and direct you to answer the question: What are the proportions of the different ingredients in Bonquet Tablets?

A. Well, I decline to answer the question because I would have to divulge my trade secrets and method of manufacturing the product.

Trial Examiner Reardon: You are directed to answer.

The Witness: I decline to answer.

Mr. Lyon: I wish, at this time, to call Mr. Clarke's attention to the fact that he was present in open court——

Trial Examiner Reardon: No, don't—he was there; he will answer for himself.

Mr. Lyon: (Continuing)—and I instruct him that unless he answers, I will take further proceedings in that matter now pending before the *the* District Court for the Southern District of California. You still refuse to answer?

The Witness: I do, on the ground that Congress has [74] never passed a law on the ground that a man has to divulge trade secrets.

Mr. Lyon: Mr. Examiner, I therefore ask a continuance of the case to a short date to be fixed by the Examiner and in the meantime I intend to take further steps to enforce the order in the contempt proceeding.—”

(Whereupon, at 3:35 p. m. *July, 1941*, the hearing in the above entitled matter was adjourned to July 25, 1941 at 10:00A. M.)

4. Your petitioner further shows that the defendant, Frederick A. Clarke, by his refusal to answer the questions as directed by this court in its opinion rendered on July 18, 1941 after a hearing on the order to show cause why he should not be held in contempt of court, has not purged himself of contempt, but on the contrary still remains in defiance and contempt of the lawful orders of this court, and is subject to the penalties provided by law for civil contempt.

Wherefore, Your Petitioner Prays that an order may be entered by this court adjudging the said defendant Frederick A. Clarke guilty of contempt in disobeying the order of this court, and that he be punished therefor in the manner provided by law and as may be found just and adequate in the discretion of the court.

FEDERAL TRADE COMMISSION,
By MERLE P. LYON,

Special Assistant to W. T. Kelley,
Chief Counsel, Federal Trade
Commission.

State of California,
County of Los Angeles—ss.

Merle P. Lyon, being first duly sworn, deposes and says that he is a special assistant to the Chief Counsel of the Federal Trade Commission; that he is the duly appointed and qualified agent of the petitioner in this behalf; that he has read the above and foregoing petition by him subscribed, and that the matters and things contained therein are true.

MERLE P. LYON

Subscribed and sworn to before me, this 24th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,
Clerk U. S. District Court,
Southern District of California.

By EDMUND L. SMITH,
Deputy.

[Endorsed]: Filed Jul. 28, 1941. [75]

[Title of Cause.]

MOTION FOR ORDER TO SHOW CAUSE.

Now comes the Federal Trade Commission, petitioner in the above-entitled cause, and moves the Court for the entry of an order directing the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court

for failure and refusal to comply with the order of this court entered May 23, 1941, ordering and directing said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Federal Trade Commission Docket No. 3660; and also for his failure and refusal to obey an order of this court entered on July 18, 1941 in the above-entitled cause ordering said defendant to appear and testify on July 22, 1941 at a hearing before a trial examiner of the Federal Trade Commission in Federal Trade Commission Docket No. 3660 and to answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?"

MERLE P. LYON,

Attorney for Federal Trade
Commission,

Washington, D. C. [76]

[Title of Cause.]

AFFIDAVIT SUPPORTING MOTION
TO SHOW CAUSE.

Merle P. Lyon, being first duly sworn, deposes and says:

1. That he is a special assistant to W. T. Kelley, Chief Counsel for the Federal Trade Commission, Washington, D. C., petitioner in the above entitled

cause, and is the duly appointed and qualified agent of the petitioner in this behalf;

2. That on July 14, 1941, pursuant to a motion supported by affidavit filed herein, an order was entered in the above-entitled matter ordering the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court for refusing to obey an order of this court entered May 23, 1941, ordering and directing the said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Federal Trade Commission Docket No. 3660;

3. That pursuant to said order of July 14, 1941, a hearing on said order to show cause was duly had on July 18, 1941 before Judge Benjamin Harrison; that said court thereupon rendered its opinion holding that the defendant was not privileged as a matter of law to refuse to answer the questions which he had been asked and had refused to answer at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative [77] formula for his product Bonequet Tablets, and holding that his refusal to do so was in contempt of this court;

4. That this Court thereupon ordered the de-

fendant Frederick A. Clarke to appear on July 22, 1941, at 2 p. m. in the Post Office Building, Los Angeles, California, before the duly appointed trial examiner of the Federal Trade Commission, and then and there to answer the questions relative to the quantitative formula for his product Bonquet Tablet which he had on July 7, 1941 been asked and which he had then refused to answer on the ground that said questions compelled the disclosure of a trade secret. That this Court in particular ordered said defendant to answer the question, "What are the proportions of the different ingredients in Bonquet Tablets?";

5. That on July 22, 1941, the said defendant Frederick A. Clarke appeared at the time and place above set forth, but refused to answer said questions or to disclose his quantitative formula for his product Bonquet Tablets all of which will appear from the official transcript of said Federal Trade Commission hearing, the pertinent excerpts from which were as follows:

"Q. Mr. Clarke, so far I have tried to keep off of controversial ground, and I now come to the point that was raised before the District Court for the Southern District of California in the contempt proceeding instituted against you in the matter entitled Federal Trade Commission vs. Frederick A. Clarke, No. 1553; and I call upon you now for the quantitative formula for your product Bonquet Tablets, and direct you to answer the question; What are

the proportions of the different ingredients in Boncquet Tablets?

A. Well, I decline to answer the question because I would have to divulge my trade secrets and method of manufacturing the product.

Trial Examiner Reardon: You are directed to answer.

The Witness: I decline to answer.

Mr. Lyon: I wish at this time to call Mr. Clarke's attention to the fact that he was present in open court——

Trial Examiner Reardon: No, don't—he was there; he will answer for himself. [78]

Mr. Lyon: (continuing) —and I instruct him that unless he answers, I will take further proceedings in that matter now pending before the District Court for the Southern District of California. Do you still refuse to answer, Mr. Clarke?

The Witness: I do, on the ground that Congress has never passed a law on the ground that a man has to divulge trade secrets.

Mr. Lyon: Mr. Examiner, I therefore ask a continuance of the case to a short date to be fixed by the Examiner, and in the meantime I intend to take further steps to enforce the order in the contempt proceeding."

(Whereupon at 3:35 p. m. July 22, 1941, the hearing in the above entitled matter was adjourned to July 25, 1941 at 10:00 A. M.)

6. That the defendant, Frederick A. Clarke, by his refusal to answer the questions as directed by *his* court in its opinion rendered on July 18, 1941, after a hearing on the order to show cause why he should not be held in contempt of court, has not purged himself of contempt, but on the contrary still remains in defiance and contempt of the lawful orders of this court, and is subject to the penalties provided by law for civil contempt.

MERLE P. LYON

Attorney for Federal Trade
Commission, Petitioner.

Subscribed and sworn to before me, this 28th day
of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of Cali-
fornia.

By J. M. HORN

Deputy [79]

[Endorsed]: Motion and Affidavit for Order to
Show Cause Why Defendant Should Not Be Pun-
ished for Contempt. Filed Jul. 28, 1941. [80]

[Title of Cause.]

ORDER DIRECTING DEFENDANT TO SHOW
CAUSE

It appearing by affidavit of Merle P. Lyon, special
assistant to W. T. Kelley, Chief Counsel of the

Federal Trade Commission, sworn to on the 28th day of July, 1941, that the defendant Frederick A. Clarke refused to answer a question at the taking of his testimony as a witness before a trial examiner of the Federal Trade Commission in a certain matter pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, FTC Docket No. 3660 at a hearing held at 2 p. m. July 22, 1941 in the Post Office Building, Los Angeles, California, after having been directed to do so by order of this court; and the court being fully advised in the premises;

It Is Ordered that the defendant Frederick A. Clarke be and he is hereby directed to show cause before this court at 11 A. M. on the 30th day of July, 1941, why he should not be punished for contempt of this court for failure and refusal to comply with the order of this court made on May 23, 1941 ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission, and also for failure and refusal to comply with the order of this court made on July 18, 1941, ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission and then and there specifically to answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?."

Service of this order upon the said defendant or

upon his attorney of record, Eldon V. Soper, Esq. shall be sufficient [81] service thereof.

July 28, 1941.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed July 28, 1941. [82]

[Title of District Court and Cause.]

DEMURRER

Comes Now Frederic A. Clarke, named and sued herein as Frederick A. Clarke, the Defendant and Respondent in the within and above mentioned proceeding, and demurs to the Affidavit Supporting Motion to Show Cause filed herein on July 28, 1941, on the following, and each of the following, grounds, to wit:

I.

That said affidavit does not state facts sufficient to constitute a cause of contempt against the Defendant and Respondent.

II.

That said affidavit is insufficient to confer jurisdiction on the above entitled Honorable Court to try or punish the Defendant and Respondent for contempt.

Wherefore, Defendant and Respondent prays that this demurrer be sustained and that the contempt

proceeding initiated by or based upon said affidavit be dismissed.

ELDON V. SOPER

Attorney for defendant Re-
spondent Frederic A. Clarke.

[Endorsed]: Filed Jul. 30, 1941. [83]

[Title of District Court and Cause.]

MOTION TO STRIKE

Now Comes Frederic A. Clarke, named and sued herein as Frederick A. Clarke, the Defendant and Respondent in the within and above entitled proceeding, and moves to strike from the Affidavit Supporting Motion to Show Cause filed herein on July 28, 1941, the following, and each of the following, portions thereof, to wit:

1. That portion of paragraph 3 of said affidavit commencing with the word "that" and page 1, line 25, thereof and continuing to and including the word "Tablets" on page 2, line 2, thereof, and reading as follows:

"that said court thereupon rendered its opinion holding that the defendant was not privileged as a matter of law to refuse to answer the questions which he had been asked and had refused to answer at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories,

Docket No. 3660; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative formula for his product Bonequet Tablets;”

2. That portion of paragraph 3 of said affidavit commencing [84] with the word “and” on page 2, line 2, thereof, and continuing to and including the word “court” on page 2, line 3, thereof, and reading as follows:

“and that his refusal to do so was in contempt of this Court.”

That said motion is made upon the grounds that the foregoing portions of said paragraph 3 are, and each of them is:

- (a) Incompetent;
- (b) Irrelevant;
- (c) Immaterial;
- (d) Sham;
- (e) Redundant;
- (f) Surplusage; and an
- (g) Attempt to vary or contradict a judicial record by parol or extrinsic evidence.

Dated: July 30, 1941.

Respectfully submitted,

ELDON V. SOPER

Attorney for Respondent and
Defendant Frederic A. Clarke

[Endorsed]: Filed Jul. 30, 1941. [85]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE IN
RE CONTEMPT. (No. 2)

Now Comes Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and, in answer and response to the Affidavit Supporting Motion to Show Cause made in this proceeding by Merle P. Lyon, and subscribed and sworn to by said Merle P. Lyon on July 28, 1941, before R. S. Zimmerman, Clerk of the above-named Honorable Court, and filed herein on said date, makes affidavit as follows, to wit:

United States of America
Southern District of California
Central Division—ss.

State of California
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

1. That your affiant is the Respondent named in that certain Order Directing Defendant to Show Cause issued out of the above named Honorable Court in this proceeding under date of July 28, 1941, by Honorable Ben Harrison, a Judge of said Court; that your affiant is the same person as Frederick A. Clarke who is named in said Order [86] as the Defendant and Respondent herein;

2. That the Affidavit Supporting Motion to Show Cause made in this proceeding by Merle P. Lyon, and subscribed and sworn to by said Merle P. Lyon

on July 28, 1941, before R. S. Zimmerman, Clerk of the above-named Honorable Court, and filed herein on said date, does not state facts sufficient to constitute a cause of contempt against your affiant;

3. That in connection with paragraph No. "4" of said affidavit, affiant denies that on July 18, 1941, or at any other time, that said Court ordered your affiant to appear before a trial examiner of the Federal Trade Commission on July 22, 1941, or at any other time, to answer any questions relative to the quantitative formula for his product, Bonequet Tablets, except, however, that affiant admits that on July 18, 1941, said Court directed your affiant to appear before a trial examiner of the Federal Trade Commission on July 22, 1941, and to answer the question "What are the proportions of the different ingredients used in Bonequet Tablets?" and alleges that said direction was an oral pronouncement of said Court;

4. That in connection with paragraph No. "6" of said affidavit, your affiant denies generally and specifically each and every allegation contained therein;

5. That your affiant has been once in jeopardy on account of the purported Order Compelling Obedience to Subpoena made herein on May 23, 1941, by Honorable Paul J. McCormick, a Judge of said Court;

6. That affiant hereby refers to and makes a part hereof with the same force and effect as though fully set forth herein all the matters and things set forth

in the Affidavit of Frederic A. Clarke in Re Contempt filed herein on July 18, 1941;

7. That the question "What are the proportions of the different ingredients used in Bonequet Tablets?" and any and all other questions as to the quantitative amounts of the ingredients [87] used by your affiant in the manufacture of Bonequet Tablets were, on May 23, 1941, and ever since have been and now are, incompetent, irrelevant and immaterial, neither pertinent nor proper, nor in the interests of justice, nor do they tend to prove or disprove any issue in the proceeding then and now pending before the Federal Trade Commission entitled "In the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660;" that the purported order of July 18, 1941, herein requiring this defendant to answer said question, is void and of no effect and is in excess of the jurisdiction of said Court;

8. That disclosure and publication of your affiant's trade secrets will irreparably injure and destroy your affiant's business, which consists of the manufacture and sale of Bonequet Tablets; that said disclosure and publication will deprive your affiant of his property without due process of law, and that affiant will not be compensated for the said taking of his said business; that the value of your affiant's said business is, and at all times herein mentioned has been, in excess of Three Thousand Dollars (\$3,000.00), lawful money of the United States of America.

9. That this Court has no jurisdiction to try or punish your affiant for contempt.

Wherefore, Affiant prays that the contempt proceeding initiated by, or based upon, said Affidavit and Order be dismissed and that your affiant, Frederic A. Clarke, be discharged therefrom and found not guilty, and for such other and further relief as may be just and proper in the premises.

FREDERIC A. CLARKE

Subscribed and sworn to before me, this 30 day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,

Southern District of California

By J. M. HORN

Deputy

[Endorsed]: Filed Jul. 30, 1941. [88]

No. 1553-B-H

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

FREDERICK A. CLARKE,

Defendant.

ORDER ADJUDGING DEFENDANT IN
CONTEMPT OF COURT

This matter came on this day to be heard upon the rule heretofore issued on July 14, 1941 against

the defendant Frederic A. Clarke (named herein as Frederick A. Clarke) to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on May 23, 1941 ordering said defendant to appear and testify before a duly appointed trial examiner of the Federal Trade Commission in a certain matter now pending before the Federal Trade Commission entitled *In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories*, Federal Trade Commission Docket No. 3660; and also upon the rule heretofore issued on July 28, 1941 against the said defendant to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on July 18, 1941, ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission on July 22, 1941 in the certain matter now pending before the Federal Trade Commission entitled *In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories*, Federal Trade Commission Docket No. 3660, and then and there to answer the question, "What are the proportions of the different ingredients in the product Boncquet Tablets?";

And it further appearing to the Court from the motions and [89] affidavits of Merle P. Lyon, special assistant to W. T. Kelley, Chief Counsel of the Federal Trade Commission, the counter-affidavits of Eldon V. Soper, attorney for the defendant,

and after hearings upon said motions, affidavits, and counter-affidavits, and after arguments of counsel, and upon full consideration thereof, that the defendant Frederic A. Clarke is guilty of contempt of this court in refusing to obey the order of this court entered May 23, 1941, in that he failed and refused at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in Federal Trade Commission Docket No. 3660 to answer certain relevant and proper questions propounded to him relative to the quantitative formula for his product Boncquet Tablets; and that he persisted in, and still remains in, contempt of this court in that he refused and still refuses to obey an order of this court entered on July 18, 1941 wherein he was ordered and directed to appear on July 22, 1941 before a trial examiner of the Federal Trade Commission and then and there answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?"; and the said defendant Frederic A. Clarke being now present before this court in person and by counsel, and the court being fully advised in the premises;

It is ordered and adjudged that the said defendant Frederic A. Clarke is guilty of contempt in his said disobedience of the lawful orders of this court as hereinabove set forth, and the judgment of this court is that he be confined in a county jail as may be selected by the marshal or the attorney general, and there retained until such time as he purges himself of such contempt by answering the

question, "What are the proportions of the ingredients used in Boncquet Tablets?", and at this time Mr. Clarke is ordered turned over to the United States marshal for the carrying out of this order.

July 30, 1941.

BEN HARRISON

United States District Judge

Enter

[Endorsed]: Filed Jul. 30, 1941. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[90]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER OF
COMMITMENT FOR CONTEMPT

Notice is hereby given that the defendant herein, Frederic A. Clarke, sometimes known as Frederick A. Clarke, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order made and entered herein on July 30, 1941, which adjudged this defendant in contempt of said Court in his disobedience of the orders of said Court as set forth in said order here appealed from, and which directed that this defendant be confined in a county jail as may be selected by the Marshal or the Attorney General, and there retained until such time as he purges himself of such contempt by answering the question "What

are the proportions of ingredients used in Bonquet Tablets'', and from the whole of said order.

Dated: July 31st, 1941.

OLIVER O. CLARK

ELDON V. SOPER

Attorneys for Defendant

Service of the within Notice of Appeal is hereby acknowledged this 31st day of July, 1941. Federal Trade Commission, Petitioner, by Merle P. Lyon its attorney.

[Endorsed]: Filed Jul. 31, 1941. [91]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 103 inclusive contain full, true and correct copies of Application for Order Requiring Defendant to Appear and Give Evidence; Order Compelling Obedience to Subpoena; Motion for Order Recalling and Vacating Order; Notice of Motion; Order Shortening Time; Affidavit of Frederic A. Clarke dated July 1, 1941; Affidavit of Merle P. Lyon dated July 8, 1941; Demurrer to Affidavit of July 8, 1941; Motion of Plaintiff July 14, 1941, for Order to Show Cause; Affidavit of Merle P. Lyon July 14, 1941, with Exhibits A, Complaint, and B, Answer, attached there-

to; Order to Show Cause dated July 14, 1941; Demurrer to Affidavit of July 28, 1941; Motion of Frederic A. Clarke July 18, 1941, with Exhibit A, Copy of Portion of Reporter's Transcript of Proceedings before Examiner for the Federal Trade Commission, attached thereto; Order dated July 18, 1941, Directing Defendant to Answer, filed July 28, 1941; Notice of Motion on Petition filed July 28, 1941; Petition for Order Adjudging Defendant in Contempt filed July 28, 1941; Motion for Order to Show Cause filed July 28, 1941; Affidavit of Merle P. Lyon filed July 28, 1941; Order Directing Defendant to Show Cause filed July 28, 1941; Demurrer to Affidavit of July 28, 1941; Motion of Defendant to Strike Portions of Affidavit of July 28, 1941; Affidavit of Frederic A. Clarke filed July 30, 1941; Order Adjudging Defendant in Contempt of Court filed July 30, 1941; [104] Notice of Appeal; Order of Supersedeas; Supersedeas Bond; Order Extending Time to Docket Appeal dated Sept. 9, 1941; Order Extending Time to Docket Appeal dated Sept. 19, 1941; Designation by Appellant of Record on Appeal; Designation by Appellee of Additional Record on Appeal; which together with the Reporter's Transcript of Proceedings before the Court, including therein the Oral Opinion of the Court, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for copying, comparing, correcting and certifying the

foregoing record amount to \$20.15 and that the said amount has been paid to me by Appellant.

Witness my hand and the seal of the District Court of the United States for the Southern District of California this 9th day of October, A. D. 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy. [105]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Appearances:

For the Petitioner:

Merle P. Lyon, Attorney, Federal Trade
Commission, Washington, D. C.

For the Defendant:

Eldon V. Soper, Esq., 510 South Spring
Street, Los Angeles, California.

Reported by A. Wahlberg. [1*]

Los Angeles, California

Friday, July 18, 1941, 2:10 o'clock P. M.

Mr. Soper: May it please the Court, before we proceed with any argument I should like to ask that there be an amendment to the affidavit, on page 2 at line 5 of Mr. Clarke's affidavit, by adding thereto the words: "That said affidavit does not state facts sufficient to constitute a cause of contempt against your affiant."

The Court: How can you amend an affidavit made by someone else?

Mr. Soper: Mr. Clarke is in court, and it is customary, I understand, that when a person is in court that such amendment is permissible. It is merely an oversight in not stating that particular fact at that point.

The Court: It is satisfactory to the Court, if there are no objections. As far as that is concerned, failure to state grounds is always available.

Mr. Lyon: I have no objection to it especially, except that it was also in the demurrer which was overruled by your Honor. Of course I don't want to be technical or take advantage of any technicalities.

The Court: Where is the change?

Mr. Soper: Page 2, line 5.

The Court: You want to add what? [12]

Mr. Soper: "That said affidavit does not state facts sufficient to constitute a cause of contempt against your affiant."

The Court: All right. You may proceed.

Mr. Lyon: If the Court please, this is a hearing on a motion made by the Federal Trade Commission, made through its duly authorized trial attorney, for an order to show cause against the Defendant, Frederick A. Clarke, why he should not be held in contempt of this Court for refusing to obey a subpoena of the Federal Trade Commission and to testify pursuant thereto.

Now, briefly, the background of this matter is as follows: A complaint was issued by the Federal Trade Commission in December of 1938 against the Defendant in this case, the Respondent in the Federal Trade Commission case, under Docket 3660, in which the Defendant was charged with false and misleading advertising in connection with the sale and distribution of a medicinal product known as Bonequet Blood Building Tablets.

The Court: I might state that I have read the application and from that application I appreciate the issues in the case.

As I understand it, there is no denial, is there, that Mr. Clarke refused to answer questions which, in effect, would have required him to have revealed the formula of his product? [13]

Mr. Soper: That is true, your Honor; the precise quantitative amounts.

The Court: Yes. And there is no question in this case but what Mr. Clarke's business is such that it comes within the term "interstate commerce"?

Mr. Lyon: No question about that.

The Court: I am asking Mr. Soper.

Mr. Soper: I think that is true, that he actually manufactures goods that are sold in interstate commerce.

The Court: And there is no dispute about the fact that the complaint was filed as attached to the application and that the answer was filed as attached to the application, that the Federal Trade Commission issued subpoenas to Mr. Clarke, and that in pursuance of those subpoenas that he did appear at such hearings, I believe as shown by your affidavit attached to the application, questions were asked relative to his formula, which he refused to reveal, that thereafter an application was made to this Court for an order requiring him to appear and testify, that in pursuance of that order Mr. Clarke did appear and did testify but refused to answer a certain specific question which, in effect, required him to reveal his formula. He did testify to the various ingredients in his formula, but refused to testify to the proportion of each.

Mr. Soper: I think I can agree with all of that statement except we do not in our affidavit state what particular [14] questions Mr. Clarke declined to answer on the former hearings.

The Court: I thought in your affidavit there was a copy of the transcript.

Mr. Soper: Of the last hearing, yes.

The Court: That was broader than the one that was submitted to me by the questions that were attached.

Mr. Lyon: It included more of the testimony, I will say that.

The Court: I might state that I think on page—your pages are not numbered, but it shows this question was asked, “What are the proportions of those different ingredients.”

Answer: “Of course, that is my trade secret.”

Then there was some discussion and then Mr. Clarke said: “Well, I decline to answer, to divulge this trade secret.”

Then the Trial Examiner said: “Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

“The Witness: Well, it wouldn’t tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.”

Then it is made to appear there that the question was asked and very definitely Mr. Clarke refused to answer the question: “What are the proportions of those different [15] ingredients” after he had theretofore set forth the ingredients that entered into his product.

Mr. Soper: Yes, your Honor.

The Court: Doesn’t that bring it down, gentlemen, to just a cold question of law?

Mr. Lyon: I believe it does; yes, sir.

The Court: As to whether or not the Federal Trade Commission at a hearing can compel a witness to reveal a trade secret. Doesn’t it bring it down to that point and that issue?

Mr. Lyon: I might further state, your Honor—

Mr. Soper (Interrupting): I think that is the question, your Honor, and it is a very serious question.

The Court: To me, of course, not attempting to interfere with any person's rights or technical rights, the Court is interested in getting down to the gist of it, and the real problem before us and deciding that point insofar as this Court has the power to do so.

Mr. Lyon: This, I believe, is a case of first impression, and for that reason is a very important matter for the Federal Trade Commission as well as the Respondent. [16]

Now, of course, I recognize that Mr. Clarke is not a voluntary witness and he didn't waive any privilege, in fact, he has been maintaining and trying to sustain his privilege all through this case; but I submit that in a case such as we have here, where the rights of the public at large are involved and the protection of the public against false and misleading advertising is involved, we have a situation where the Federal Trade Commission in its efforts to protect the public will be seriously handicapped if the aid of a court of equity is given to a defendant to enable him to refuse to give the formula for his product to the Commission, and I very seriously doubt that there will be any possible injury to any competitors by reason of such disclosure. As a matter of fact, the only persons to whom such a formula would be disclosed would be doctors and other expert witnesses.

The Court: It would become public property. Your findings and records are public, are they not?

Mr. Lyon: The findings are public, and, of course, the testimony is public.

The Court: Then it becomes a part of the public record.

Mr. Lyon: In the sense that it is a public document kept in Washington.

The Court: Anybody that is interested in ascertaining his formula would have access to it.

Mr. Lyon: That is right. I appreciate that. But this [31] matter can be taken care of very easily by holding the sessions of the Federal Trade Commission hearing in secret and allowing nobody to enter the hearing room except the witnesses, and not to disclose the formula upon the record itself, but the formula can be shown to the witnesses outside of a hearing and their opinion based thereon, and the transcript of the testimony itself therefore will not show what the formula is. In other words, it will be a matter for the Commissioner's knowledge alone.

The Court: The way I feel about that point is this—and I might as well be frank about it—in other words, I don't think there is any question but that this is a valuable trade secret and testimony as to it will be revealing it. I do not think there is any question that such revelation opens the door wide for serious injury to Mr. Clarke.

However, is that of any materiality in the issue before the Court? The sole question is, What is

material to the issues in this case, and then Mr. Clarke declined to answer on the ground that it is a trade secret. Whether or not it will bring injury to him is not a matter for this Court to pass upon. I wouldn't waste any time in the argument here if it is proper for this Court to consider the probabilities of a private wrong or private injury. [32]

Mr. Soper: May it please the Court, may I offer in evidence the application or the order requiring giving of evidence and the order compelling obedience to subpoena in this proceeding, the latter being dated May 23rd——

The Court (Interrupting): It is a part of the record now.

Mr. Soper: It is before the Court. I just want it to be clear that it is a part of the record. It is the only order and terms in the file. [33]

Mr. Soper: If I may have just one short word, your Honor.

In connection with Mr. Lyon's statement in regard to physical tests of this product, I now stipulate that Mr. Clarke—I stipulate for him—will bear the expense of any tests which are necessary or advisable to determine the efficacy of this product in the matter now pending before the Federal Trade Commission. I make that stipulation in open court and for all purposes in this proceeding. [46]

OPINION OF THE COURT

The Court: Gentlemen, this presents an interesting and intriguing question of law, one that has interested the Court considerably. I have not only been interested in studying and reading the authorities submitted by counsel on both sides, but have spent considerable time in independent research. And it is true that there is a conflict in authorities, and some of the conflicts cannot be reconciled, in my way of thinking. [49]

In this case the facts are virtually agreed to, but there is a wide difference of opinion as to the law that is applicable to those particular facts.

The affidavit and answer recognizes the fact that the complaint was filed before the Federal Trade Commission after the effective date of the 1938 amendment. An answer was filed, Mr. Clarke appeared before the Commission at a hearing, answered certain questions and refused to answer such questions as would tend to reveal the formula of his product, claiming that it would be revealing a trade secret. Upon that basis he declined to answer.

An order for an application was made to the Court for an order requiring Mr. Clarke to appear and to give evidence and, in pursuance to that order, Mr. Clarke did appear and did give evidence, but declined to answer the question, "What are the proportions of those different ingredients?" which question followed the testimony of Mr. Clarke wherein he testified concerning the various ingredi-

ents that went into his products, but he declined to reveal the proportions of each ingredient.

It seems to me that in view of the language of the complaint filed by the Federal Trade Commission under the 1938 amendment, the Commission had jurisdiction to conduct the hearing. It also appears to me that the question as to the contents of his product or the formula was a material question. So it comes down to the question as to whether or not [50] Mr. Clarke could refuse to testify on the ground that it would tend to reveal a trade secret.

Under Section 46 of Title 15, U. S. C. A. under subdivision (f), it would appear that it was contemplated that under some circumstances there would be revealed to the Federal Trade Commission trade secrets.

The powers of the Commission are broad and the scope of its investigative powers is also broad, providing that a proper complaint has been filed indicating that the Commission has jurisdiction.

Counsel for Mr. Clarke has cited a number of cases on page 3, particularly the case of Federal Trade Commission v. P. Lorillard Company, 283 Fed. 999, and I think that the three cases there cited all hold in substance the same.

I notice in this case of Federal Trade Commission v. P. Lorillard Company, the case in 283 Fed., this language:

“It was not intended to grant an unlimited power of inquisition or an unlimited right of

access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.”

That case naturally wouldn't apply to the case at bar, for there is a complaint charging wrongdoing.

Of course, some of the other cases go off on the question of whether or not the parties are engaged in interstate [51] commerce. In this case that question is not involved because it is recognized by both parties that Mr. Clarke is so engaged.

I have read this case of *Carver v. Pinto Leite*, found in 7 Law Reports, page 90, also the case of *Tetlow v. Savournin*, 15 Phila. 170, and other Federal cases cited by counsel for Mr. Clarke. There is no question in the Court's mind but that that Philadelphia case and the case found in the Law Reports tend to uphold him in his position.

Reference is also made to the case of *United States v. Basic Products Company*, 260 Fed. 472 and, like I mentioned a moment ago, that case went off on the fact that the party against whom the complaint had been filed was not engaged in interstate commerce.

I feel that the case of *Moxie Nerve Food Company v. Beach*, 35 Fed. 465, also tends to uphold Mr. Clarke's counsel, as well as the *Star Kidney Pad Company v. Greenwood*, 3 Ontario Reps. 280.

However, I doubt whether, if that case were tried

in an American court, that an American court would hold as it was held in that case. That was a case where a suit was had on a promissory note that had been given for certain pads, and the defense was that the notes were obtained by a fraudulent representation, and I believe that our present-day method of trying cases would have permitted the defendant to have demonstrated that the pads were not as repre- [52] sented. And while the Court did say in there, "That question would have to be solved by the experience of the sufferer rather than the skill of an expert, and the composition of the pads having formed no part of the inducement of the defendant to buy them," it indicates that the composition and the representations as to composition were not the real issue.

It is rather interesting to note that the cases that tend to uphold Mr. Clarke's position are, most of them, from 60 to 70 years old. I do not mean to infer that a rule that was recognized by a court in 1871 or 1881 or 1883 should be disregarded because of the lapse of time, but it is interesting because it indicates a trend of authorities.

I feel, as I stated before, that the question was material to the issue being tried by the Commission and that Mr. Clarke should have answered the question unless, as stated, that it be deemed a trade secret.

I also feel that in referring to the cases cited by Mr. Clarke's counsel by reason of their age have

been, to a marked extent, overruled by more recent cases. The tendency of courts and of fact-finding bodies is to find the most direct method of ascertaining the truth.

I think that, was boiled down and very clearly set forth in the case of *Funk v. United States*, 290 U. S. 371, wherein the court states:

“The fundamental basis upon which all rules [53] of evidence must rest if they are to rest upon reason is their adaptation to the successful development of the truth, and since experience is of all teachers the most dependable, and since experience is also a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the falsity or unwisdom in the old rule.”

If I remember correctly, that case goes into the question and discusses somewhat the matter of privilege, and tends to restrict privileges afforded to witnesses wherever the granting of such privilege would tend to withhold the truth from the court.

We have a case from our own district entitled *Perkins Oil Well Cementing Company v. Owen*, 293 Fed. 759, wherein Judge James wrote the opinion. Among other things, he said:

“Courts have held, and not a few of them, especially in earlier decisions, that the mere

fact that a party might in a suit, even a civil one, be required by the judgment to pay a sum in excess of a compensatory amount to his adversary, would entitle him, when examined as a [54] witness, to claim the privilege. This was extending the constitutional protection under the plea of analogy to a limit which is not now recognized to be reasonable. In 28 Ruling Case Law, p. 455, the editor gives expression to what seems to be the modern rule, where it is stated:

“ ‘However, it has been held that the privilege of a witness does not apply to penalty of a purely remedial character, and the distinction between the provisions of a remedial statute for the enforcement of the remedy and a penal statute has been stated to be that the penalty imposed by the remedial statute is not imposed as a punishment for a public wrong, but as a redress for a private grievance.’ ”

Now, you take again, following some of the authorities cited by counsel for Mr. Clarke, he cites Wigmore and he underlines this part:

“What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute provision for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth.” [55]

In the first place, that citation recognizes that there is no absolute provision for the protection of a man and his trade secrets, and he is required to disclose them except where it is not indispensable for the ascertainment of the truth.

I believe there is another citation that also recognizes that. In the case of *DuBois v. Thomas*, 122 Southern 495 and 154 Miss. 286, referred to in Mr. Clarke's counsel's memorandum, it is cited to show that where a trade secret is relative to an issue being tried, and its disclosure is essential in order that the issue may be correctly determined and justice administered, a witness is not privileged to refuse to disclose it. The case of *DuBois v. Thomas*, found in 122 Southern at 495, clearly makes it incumbent upon a witness to reveal his trade secrets.

We also have the case *In Re Edge Ho Holding Corporation*, 176 N. E. 537, which tends to so hold, as well as other cases cited by counsel for the Commission, which it is not necessary to review.

But after a careful study I feel confident that the present tendency of the law is to require a person to answer questions that are necessary to be answered in the ascertainment of the truth.

We have here a number of cases in which the litigants were private parties and only private rights were involved. In this case we have as the moving party the Federal Trade [56] Commission which, in effect, is the Government itself acting in the interests of the public, because if its activities

were not in the interests of the public, it would not have the right to conduct such hearings.

It seems to me that the question asked is material, that in order to ascertain the facts it will be necessary for the witness to answer the question heretofore referred to.

I am not unmindful of the fact that this may work a hardship on Mr. Clarke. I approached this question really as a mediator between the parties because I felt, when it was first presented to me, that Mr. Clarke was perfectly justified in taking the position that he took. But after studying the authorities and giving it considerable thought, I feel that the position of the Federal Trade Commission is correct.

I also recognize the fact that there is a probability that the revealing of this trade secret may be injurious to Mr. Clarke, but private rights must give way where the good order of society is involved.

It seems to me that it would be a very peculiar situation that the Federal Trade Commission, in holding hearings, could not obtain answers to material questions. Counsel has questioned the jurisdiction of this Court and the proceeding by which we have arrived at the present point in the proceedings, but if Mr. Clarke would decline to answer [57] such questions it would absolutely thwart the Federal Trade Commission in its investigation promulgated by reason of the complaint.

I feel that it is going to be incumbent upon Mr. Clarke to answer the question as to what are the proportions of the different ingredients contained in his product.

I do not feel inclined at this time to unceremoniously direct a commitment against Mr. Clarke for contempt, because I feel that this is a serious question and he is entitled to his day in court to have the matter heard and passed upon, and I am going to give Mr. Clarke an opportunity to answer the question. Of course, if he desires to stand pat and not answer the question, the Court will be called upon and compelled at that time to exercise whatever authority it may have. It may even become necessary for the issuance of a commitment.

I think in that respect that the parties involved should not overlook the fact that not only are we involved here with a question of a commitment for contempt, but if the Commission had seen fit they could have proceeded under Section 50 of Title 15 U. S. C. A., which provides a very severe penalty, of a fine of not less than \$1,000 nor more than \$5,000, or for not more than one year in jail, or both such fine and imprisonment. It isn't the responsibility of the Court, but it will be a matter for the Federal Trade Commission to determine whether they want to proceed through [58] contempt or through criminal prosecution, or by both.

May I inquire as to when the present hearing is continued to?

Mr. Lyon: The present hearing has been continued to next Tuesday afternoon at 2:00 o'clock July 22, 1941, at Room 229 in the Post Office Building, Los Angeles, California.

The Court: It is the order of the Court that Frederick A. Clarke appear before the Trial Examiner of the Federal Trade Commission next Tuesday afternoon at 2:00 p. m., July 22, 1941, and there continue with his examination and testimony and answer the question, "What are the proportions of those different ingredients?" referred to in his examination heretofore taken and referred to in the transcript. If Mr. Clarke appears and answers the question, the Court will dismiss these proceedings, otherwise we will see you all again, gentlemen.

Mr. Soper: I appreciate the industry with which your Honor has approached this question, and I regret the apparent conclusion you have come to.

Mr. Lyon: May we have a short continuance of this case for the purpose of ascertaining whether or not Mr. Clarke will answer the question?

The Court: If he fails to answer this, you will have to present it by a petition and order to show cause. [59]

Los Angeles, California

Wednesday, July 30, 1941. 11:05 o'clock A. M.

The Clerk: No. 1553-BH, Civil Federal Trade Commission v. Frederick A. Clarke, hearing on petition and order to show cause.

The Court: Mr. Clarke is back to show cause why he shouldn't be held in contempt. I would like to hear from counsel.

Mr. Soper: May it please the Court, I wish to make a brief explanation of our position.

The other day in the Federal Trade Commission hearing Mr. Lyon handed me a paper reading "Notice of Motion," and he dated it July 25, 1941. That was handed to me on July 25, 1941.

Attached to that paper was one reading "Petition for Order Adjudging Defendant in Contempt."

No service was made upon Mr. Clarke, and upon examination of Rule 20 of the rules of this court, it reads:

"Mondays shall be motion days on which all calendars will be called and upon which all motions and other matters shall be heard unless set for a particular day by order of the Court. When notice to the adverse party is required to be given, such notice shall be for a Monday unless the Court [60] for good cause shown, shall direct otherwise.

When there has been an adverse appearance, a written notice of motion shall be necessary. Such notice of motion shall be served upon the

adverse party, or his attorney, at least ten days before the time appointed for the hearing, unless the Court or one of the judges thereof shall, for good cause by special order, prescribe a shorter time, and shall be filed with the Clerk not later than 5:00 o'clock p. m. on the Thursday immediately preceding the Monday appointed for the hearing by the notice of motion.

* * *''

Now relying upon Rule 20 we did not appear last Monday and I was quite shocked to learn that your Honor had taken exception to that. Mr. Lyon so informed me yesterday. Of course, no order from the Court had been delivered to either of us and I assumed that your Honor will naturally follow the rules and discharge the matter then.

The Court: Well, the matter is here today on order to show cause, and you have appeared.

Mr. Soper: I have appeared.

The Court: And Mr. Clarke is present here in pursuance to that order to show cause.

Mr. Soper: I called your Honor, and when I learned I was wanted in court today I said I immediately would appear.

Now I have prepared, in response to the papers which [61] were delivered to me, a demurrer, a motion to strike, and an answer, but this morning Mr. Clarke was served——

(Addressing the Defendant Clarke) Was it this morning?

The Defendant Clarke: Last night.

Mr. Soper: Last night—I am sorry—Mr. Clarke was served with some other papers and, as I understand it, they consist of an order directing the defendant to show cause, a motion for order to show cause, and affidavit supporting the motion to show cause.

Now Mr. Lyon has been kind enough to give me his copies of these papers, and I have never seen them until about one minute before your Honor took the bench this morning, so I haven't anything in response to those papers to offer at this time.

The Court: A written appearance is not required.

As I understand it, it is alleged here—and there is no dispute of the fact—that Mr. Clarke appeared at the hearing before the Federal Trade Commission as directed by the Court.

Mr. Soper: Yes, that is correct, your Honor.

The Court: And at that hearing he was asked, "What are the proportions of the different ingredients in Bonequet Tablets," and his answer was, "Well, I decline to answer the question because I would have to divulge my trade secrets and methods of manufacturing the product." [62]

Is that correct?

Mr. Soper: Well, may it please the Court, I think that is true, but we would like the opportunity to file an answer because I understand that contempt proceedings are tried upon pleadings which consist

substantially of an affidavit and counteraffidavit, or a petition and answer to petition.

In other words, I think it is *encumbent* upon us to present some sort of pleading, and I respectfully request that an opportunity be given to me to prepare such a pleading. I can be here this afternoon at 2:00 o'clock, and we can proceed upon the basis I have before me.

In response to the petition, I would like to offer a demurrer, a motion to strike, and then if it should become necessary, an answer.

The Court: Well, I think we will only proceed on the order to show cause.

Mr. Soper: That is, the order directing the defendant to show cause dated July 28, 1941?

The Court: Yes, based upon, I believe, an affidavit, is it not?

Mr. Soper: I believe it is.

Mr. Lyon: That was based upon a motion and affidavit.

Mr. Soper: Based upon an affidavit, I believe. Those are the papers I have not seen, your Honor, until just a moment ago. [63]

The Court: In other words, you want some time to file a responsive pleading?

Mr. Soper: If I may, your Honor, yes.

Mr. Lyon: If the Court please, I believe the situation is the same as it was on the 18th of July when the Court rendered an opinion holding the defendant in contempt of court and the defendant,

by his own admission, has refused to answer the question asked and which the Court directed the defendant to answer. I think we are just wasting a lot of time here if we have to have a formal answer to this order to show cause. We really have the original order to show cause and nothing else before us.

The Court: I think that is probably true, but the Court adopted this other procedure which may be, to a certain extent, surplusage, but I wanted to give Mr. Clarke a full opportunity to clear this matter up without the necessity of using the extreme power vested in the Court in contempt cases. I want to give him a full opportunity to purge himself, and there is only one question before the Court now, and that is whether or not Mr. Clarke refused to answer this question. That is the only thing the Court is interested in.

Mr. Soper: Well, of course, I take it, your Honor, that we will be permitted to present ourselves before the Court upon a proper record, and I wish to show your Honor papers which I am holding in my hand—I worked on those [64] late last night and early this morning and I have not been wasting my time in this matter.

The Court: Can you have it in by 2:00 o'clock?

Mr. Soper: I think I can, your Honor. I don't know. It is 11:15 now.

Perhaps if it was 3:00 o'clock, would it suit your Honor's convenience just as well? An extra hour would be appreciated.

The Court: I am going to continue the matter until 3:00 o'clock so that counsel can present any affidavits or motions that they desire to make. [65]

I am going to continue the matter until 3:00 o'clock and direct Mr. Clarke return here at that hour. That means 3:00 o'clock sharp, gentlemen.

Mr. Lyon, the Court feels that the matter should be fully reported so the record will be complete. I am going to direct that the reporter report these proceedings, and also those at 3:00 o'clock.

Mr. Lyon: Very well, sir.

(Thereupon, at 11:20 o'clock a. m., a recess was taken until 3:00 o'clock p. m. of the same date.) [66]

Los Angeles, California

Wednesday, July 30, 1941

3:00 O'clock P. M.

The Court: Proceed.

The Clerk: Federal Trade Commission vs. Clarke.

Mr. Soper: May it please the Court, before anything else is taken up, I wonder if the name of Mr. Clarke as it appears on the title of this proceeding could be corrected. Mr. Clarke's first name is spelled F-r-e-d-e-r-i-c A. C-l-a-r-k-e. I think it would be well at this time to correct the misnomer in the title as it appears in the papers of this proceeding.

The Court: Do you have anything else that you wish to present, Mr. Soper?

Mr. Soper: Your Honor, I take it that the motion for the correction is granted?

The Court: Yes. That will be corrected.

Mr. Soper: I present at this time to counsel and to the Clerk of the Court a demurrer—may I just hand it up?

The Court: Yes.

(The document was passed to the Court.)

The Court: The demurrer will be overruled.

Mr. Soper: At this time may I have an exception noted in the record?

The Court: Yes. [67]

Mr. Soper: At this time we wish the record to show that I am now serving upon Mr. Lyon, attorney for the Commission, a motion to strike.

The Court: On what proceeding do you base a motion to strike an affidavit?

Mr. Soper: Well, because the affidavit here represents the pleading of the Commission.

The Court: That motion will be denied.

Mr. Soper: May I have an exception to that?

The Court: You may have an exception.

Mr. Soper: Your Honor may not have noticed that this is an attempt to vary or contradict a judicial record by parol or extrinsic evidence.

The Court: The Court is familiar with it.

Mr. Soper: At this time we will file with the Court a copy of our reply to the affidavit, Frederic A. Clarke, in re contempt No. 2.

The Court: What is your point in Paragraph 3 of your affidavit to the effect that I didn't direct him to appear and answer that question?

Mr. Soper: The only question your Honor ordered him to appear to answer "What are the proportions of the different ingredients used in Bonquet tablets."

The Court: That is the only question I am interested in, as far as the contempt proceedings are concerned.

Mr. Soper: That is the only question, to the best of [68] my recollection, that your Honor ordered him to answer.

I also state this, your Honor, that this morning after we adjourned I looked at the file in this proceeding—I couldn't find it in the Clerk's office—and I came and talked to your Honor in chambers to see if you had it, and then I directed your Honor's attention to what was my best recollection that your Honor had not found Mr. Clark in contempt heretofore.

The Court: At that time I directed him to answer a question instead of finding him in contempt. I wanted to give him an opportunity to purge himself if he felt so inclined.

Mr. Soper: That is my recollection. I was very much disturbed. I went to the Clerk's office to find an order which was filed in this case, dated July 18, 1941, which recites some other things, and I find Mr. Clarke was in contempt of court.

The Court: He was not in contempt. Instead of judging him in contempt, I gave him the opportunity to purge himself. I was just trying to be decent to Mr. Clarke.

Mr. Soper: I didn't mean it that way. I am sorry if the thought occurred to you. I didn't want the record to show that he was found guilty of contempt and have the same thing occur again.

The Court: I gave him an opportunity to purge himself. Now, as I understand it, there is no question—I might state that if I felt this way the other day—perhaps if the [69] Court had used a little better judgment it would have continued this matter over and given him an opportunity to answer the question, rather than to have directed him to and then requiring another order to show cause. I feel, in effect, that this is the same thing because Mr. Clarke is now before this Court for failure to comply with that order. The Court has jurisdiction, so this is more or less of a continuing matter, and I consider this hearing today a continuation of the hearing of the other day, at which time I gave him an opportunity to answer the question.

As I understand, it is admitted that at the time of the hearing the question was asked: "What are the proportions of the different ingredients used in Boncquet tablets," and Mr. Clarke at that time refused to answer that question. Is that not true?

Mr. Soper: That is correct, your Honor.

The Court: And he refused to answer claiming that it would require him to divulge a trade secret. That was the ground upon which he refused to answer.

Mr. Soper: Trade secrets and method of manufacture.

The Court: There is no method of manufacturing involved in this question.

As I understand it, they are not attempting to obtain his method of operation or manufacturing. Any secret that he may have in that is not involved in this. The only question involved as to this are the proportions of the ingredients [70] in the tablets.

Now, there has been no question here before the Court as to whether or not it was necessary for him to divulge his method of manufacturing this product.

Am I not correct in that, Mr. Lyon?

Mr. Lyon: That is correct, your Honor.

The Court: And heretofore, as the Court has indicated, the record discloses that there was a complaint filed by the Federal Trade Commission, that Mr. Clarke was subpoenaed to appear before that Commission and he refused to answer those questions which would have the effect of divulging the proportions of the various ingredients in his product; then thereafter the Court issued an order directing him to appear and testify, and in pursuance of that order he again refused to give the proportions of the various ingredients that go into his products; that he was cited before this Court to show cause why he shouldn't be punished for contempt for his failure to answer, and the Court spent considerable time not only in independent research, but in reading various authorities, and at that time the Court held that Mr. Clarke should have answered that question, rather than to adjudge him in con-

tempt and commit him at that time, I gave him an opportunity to purge himself.

That opportunity was afforded him, and he saw fit to still persist in refusing to comply with the order of this Court, and under these circumstances there is only one thing [71] the Court can do.

The Court at this time adjudges Mr. Clarke, also known as Frederick A. Clarke, also known as Frederic A. Clarke with the "k" off of Frederick guilty of contempt, and the judgment of this Court is that he be confined in a county jail as may be selected by the United States Marshal or by the Attorney General, and there detained until such time as he purges himself of such contempt by answering the question: "What are the proportions of the different ingredients used in Bonquet tables?" At this time Mr. Clarke is turned over to the United States Marshal for the carrying out of this order.

Mr. Soper: May it please the Court, might I note an exception in the record?

The Court: Yes.

I direct the attorney for the Federal Trade Commission to draw the commitment.

Mr. Lyon: Very well, sir.

Mr. Soper: I would appreciate it very much, pending an appeal on this proceeding, which we intend to take—I wish to announce at this time that we shall take an appeal—if Mr. Clarke might be released upon his own recognizance pending the appeal.

He is a businessman and has lived in the County for more than 25 years. I have known him about 20 years of that time myself. He is running a substantial business out here, [72] built solely by his own efforts, and we are engaged in certain litigation in the Superior Court in the State of California, and there is an order issued requiring that he be in attendance in that Court tomorrow morning at 10:00 o'clock.

The Court: He has a good excuse for not being there.

Mr. Soper: Well, of course, I had hoped, your Honor, that he might be released until this matter has been determined.

The Court: The Court doesn't feel so inclined. The Court feels that it has given Mr. Clarke every opportunity to answer this question. The Court has no feeling in this matter toward Mr. Clarke, but at the same time he stands here defying the order of this Court, and if this Court has any power to enforce its order—if it is a proper order—why, this is the proper procedure. He has selected this course after careful consideration and after advice by counsel.

Mr. Soper: I want to make myself clear upon that. I never advised anybody to violate an order of the Court, and if that is the impression——

The Court: You are not on trial.

Mr. Soper: Whether I am on trial or not, your Honor, I never advised anybody to violate an order of the Court.

Mr. Lyon: May I ask at this time whether the Court is willing to adjudge the cost in this matter, to award costs in this matter? [73]

The Court: This is purely a civil contempt matter for the purpose of enforcing the order of this Court, and if there is any other procedure it will have to be taken under criminal process.

Mr. Lyon: Does the Court feel that the Federal Trade Commission is entitled to a compensatory fine?

The Court: Not when it is a civil contempt. I don't feel under a civil contempt that this Court should do anything but direct him to comply with the order of the Court, and confine him until such time as he does comply with such order.

Mr. Lyon: I merely wanted to point out that the Commission has been put to considerable expense, several thousands of dollars, in the matter.

The Court: You selected your form of procedure. You elected to proceed through civil contempt. If this had been a criminal contempt, the Court could have then committed him for a definite period of time and imposed a fine, in addition to any penalty that might have been imposed to bring about a compliance with the order. Your statute provides for a criminal remedy, and whether or not the Department of Justice desires to proceed along that line, that is a matter for them to determine, but at this time I am going to only make one order.

Mr. Clarke will be remanded to the custody of the Marshal. [74]

(Whereupon, at 3:15 o'clock p. m., the above-entitled matter was concluded.)

[Endorsed]: Filed Sept. 30, 1941. [75]

[Endorsed]: No. 9948. United States Circuit Court of Appeals for the Ninth Circuit. Frederic A. Clarke, sometimes known as Frederick A. Clarke, Appellant, vs. Federal Trade Commission, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 11, 1941.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9948

FEDERAL TRADE COMMISSION,

Appellee,

vs.

FREDERICK A. CLARKE,

Appellant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD.

To the above named appellee and to Paul P.
O'Brien, Clerk of the above entitled Court:

Appellant intends to rely upon the following
points on this appeal:

I.

That the District Court of the United States for
the Southern District of California, Central Divi-
sion, was without jurisdiction to make the order
appealed from for the reason that it is a violation
of appellant's rights under the Fourth Amendment
to the Constitution of the United States, to compel
appellant to reveal the proportions of the various
ingredients as used in the product produced and
vended by him.

II.

That the order appealed from is void for the
reason that the Federal Trade Commission lacks

authority to require appellant to reveal the proportions of the various ingredients as used in the product produced and vended by appellant.

III.

That the order appealed from is void because the record upon which said order is based does not disclose any duty upon appellant to disclose his trade secret as to the proportions of the various ingredients as used in the product produced and vended by him, and that said record discloses that said matter is not within the jurisdiction of the Federal Trade Commission.

IV.

That the order appealed from is void for the reason that the questions asked of appellant, and which he refused to answer, and for which refusal the order appealed from was made, were not material or relevant or competent as to any issue as to which the Federal Trade Commission had jurisdiction or should be permitted to inquire of appellant in the proceedings in which said questions were asked.

DESIGNATION

Appellant designates the following parts of the record which he thinks necessary for the consideration of the foregoing points:

- (1) Application for Order Requiring Giving of Evidence;

(2) Order Compelling Obedience to Subpoena, May 23, 1941;

(3) Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena;

(4) Notice of Hearing Motion for Order Recalling Order;

(5) Order Shortening Time for Service of Notice of Hearing;

(6) Affidavit of Frederic A. Clarke in Support of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena;

(7) Affidavit of Merle P. Lyon, dated July 8, 1941;

(8) Demurrer of Respondent to Affidavit of Merle P. Lyon;

(9) Motion of Petitioner, July 14, 1941, for Order to Show Cause;

(10) Affidavit of Merle P. Lyon, July 14, 1941, and Exhibit A, Complaint Docket, No. 3660, F. T. Commission Exhibit B, Answer of Respondent, No. 3660, F. T. Commission;

(11) Order to Show Cause dated July 14, 1941, Ret. July 18th;

(12) Demurrer of Respondent to Affidavit of July 14, 1941;

(13) Affidavit of Frederic A. Clarke, July 18, 1941 Exhibit A, Copy of Portion of Reporter's Transcript;

(14) Order Dated July 18, 1941, Directing Deft. to Answer;

(15) Notice of Motion on Petition for Order Adjudging Defendant in Contempt filed July 28, 1941;

(16) Petition for Order Adjudging Defendant in Contempt verified July 24th and filed July 28, 1941;

(17) Motion for Order to Show Cause filed July 28, 1941;

(18) Affidavit of Merle P. Lyon filed July 28, 1941;

(19) Order Directing Defendant to Show Cause, Returnable July 30, 1941, and filed July 28, 1941;

(20) Demurrer of Respondent to Affidavit of July 28, 1941;

(21) Motion of Respondent to Strike Affidavit of July 28, 1941;

(22) Affidavit of Frederic A. Clarke filed July 30, 1941;

(23) Order Adjudging Defendant in Contempt of Court, July 30, 1941;

(24) Notice of Appeal from Order of July 30, 1941;

(25) Opinion of the Court, Oral, Pages 49 to 59 inclusive of the Reporter's Transcript;

(26) That portion of the Reporter's Transcript of proceedings herein as follows:

(a) All of page 1 of said Transcript;

(b) All of pages 12, 13, 14, and 15, and to and including line 21 on page 16;

(c) All of page 31, and to and including line 23 on page 32;

(d) Commencing with line 16 on page 33, down to and including line 24, on said page 33;

(e) Commencing with line 16 on page 46, down to and including line 24, on said page 46;

(f) Commencing with line 18 on page 49, to and including line 26 on said page 49, and all of pages 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 64, and to and including line 11 on page 65;

(g) Commencing with line 8 on page 66, to and including line 17 on said page 66, and all of pages 67, 68, 69, 70, 71, 72, 73, 74 and 75.

Dated: October 9th, 1941.

OLIVER O. CLARK

Attorney for Appellant.

State of California,
County of Los Angeles—ss.

Frances A. Clary, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1203 Garfield Building, 403 West Eighth Street, Los Angeles, California. That on the 9th day of October, A. D., 1941, affiant served the within Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Record on the Appellee in said action, by placing true copies thereof in separate envelopes addressed to

each of their Attorneys at the business address of each said Attorney, as follows:

Merle P. Lyon,
Attorney at Law,
Federal Trade Commission,
Washington, D. C.

William T. Kelley,
Chief Counsel for Federal
Trade Commission,
Washington, D. C.

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed; there is a regular communication by mail between the place of mailing and the places so addressed.

FRANCES A. CLARY

Subscribed and sworn to before me this 9th day of October, 1941.

(Seal) DAVID D. SALLEE
Notary Public in and for said County and State.

[Endorsed]: Filed Oct. 11, 1941. Paul P. O'Brien,
Clerk.

No. 9948

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FREDERIC A. CLARKE, sometimes known as
FREDERICK A. CLARKE,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

APPELLANT'S OPENING BRIEF.

OLIVER O. CLARK,

ROBERT A. SMITH,

1203 Garfield Building, Los Angeles,

Attorneys for Appellant.

FILED

JAN 29 1942

PAUL P. O'BRIEN,

CLERK

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No. 9948

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FREDERIC A. CLARKE, sometimes known as
FREDERICK A. CLARKE,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Pleadings and the Facts.

Appellant appeals from an order which directs his commitment for contempt for his refusal to reveal to the Federal Trade Commission *the proportions* of the several ingredients used in compounding a medicinal product under a secret formula owned by him.

THE PLEADINGS:

The pleadings consist of (1) a complaint filed by the Federal Trade Commissioner against appellant on December 8, 1938, wherein appellant is charged with falsely advertising the therapeutic value of his medicinal product [Tr. pp. 37 to 44 incl.]; (2) appellant's answer wherein he denies said charges and challenges the jurisdiction of the Federal Trade Commission to proceed upon the allega-

tions of its complaint [Tr. pp. 44 to 47 incl.]; (3) application for order requiring the giving of evidence wherein there is shown the filing of said complaint and answer, the holding of a hearing thereon by said Federal Trade Commission, and the refusal of appellant to reveal the proportions of the ingredients as used in his said compound [Tr. pp. 2 to 7 incl.]; (4) order compelling obedience to subpoena wherein appellant was required by the District Court to make said revelation [Tr. pp. 8 to 9 incl.]; (5) affidavit of Merle P. Lyon, of date July 14, 1941, in support of order to appellant to show cause why he should not be required to make said revelation or to stand adjudged in contempt [Tr. pp. 24 to 36 incl.]; (6) affidavit of appellant in *re* contempt, wherein appellant sets forth the proceedings before said Federal Trade Commission and the grounds of appellant's refusal to reveal his said trade secret [Tr. pp. 50 to 81 incl.]; (7) petition for order adjudging appellant in contempt, wherein the continued refusal of appellant to make said revelation is set forth [Tr. pp. 85 to 89 incl.]; (8) affidavit of Merle P. Lyon, of date July 28, 1941, supporting motion to require appellant to show cause why he should not make said revelation or be punished for contempt, and wherein the continuing refusal of appellant to make said revelation is set forth [Tr. pp. 90 to 94 incl.]; (9) order, of date July 28, 1941, directing appellant to show cause why appellant should not make said revelation or be punished for contempt [Tr. pp. 94 to 96 incl.]; (10) appellant's demurrer and motion to strike, addressed to said affidavit [Tr. pp. 96 to 98 incl.]; (11) affidavit of appellant, of date July 30, 1941, in response to said affidavit of said Merle P. Lyon, wherein appellant sets

forth reasons why he refuses to reveal said trade secret [Tr. pp. 99 to 102], and (12) order, of date July 30, 1941, adjudging appellant in contempt of court, and which recites appellant's refusal to make said revelation and adjudges appellant in contempt therefor [Tr. pp. 102 to 105 incl.].

THE FACTS:

Appellant represents that this Honorable Court has jurisdiction of this cause for the reason that appellant's grievance, urged here, is justifiable under the Fourth and Fifth Amendments to the Federal Constitution.

The record shows:

- (a) That appellant owns and uses a secret formula for compounding a medicinal product which he markets in interstate trade under the names "Boncquet Tablets", "Boncquet Blood Building Tablets" and "Boncquet Hemo-Tabs". His production and marketing plant is located at Glendale, California [Tr. pp. 37, 57 and 58];
- (b) That in marketing this product appellant advertised and claimed that his product possessed therapeutic value as a builder of human blood [Tr. pp. 38 to 43 incl.];
- (c) That prior to the filing of the complaint herein referred to, affiant builded, and at the time of the filing of said complaint was conducting, a large, extensive, expanding and profitable business throughout the United States of America, in the manufacture and sale of his said products produced under his said secret formula [Tr. p. 57];

- (d) That on December 8, 1938, the Federal Trade Commission instituted proceedings against appellant upon its allegations that appellant's advertising respecting the therapeutic value of his product was false and misleading, and sought to sustain its charges by compelling appellant to reveal his secret formula [Tr. pp. 37 to 44 incl.], and
- (e) That appellant thereupon revealed the ingredients of his compound but refused to reveal the proportions of said ingredients as used in his product [Tr. pp. 71 to 76 incl.].

Following his refusal to reveal his secret as to the proportions of said ingredients used in compounding said product, appellant was cited for contempt before the Honorable District Court, and, after hearing, was adjudged guilty and ordered committed to the custody of the Marshal until he should answer the questions which called for the revelation of his trade secret as to the proportions of the several ingredients as used in compounding said products. From that order of commitment this appeal is taken.

There is no evidence in this record which tends to show:

- (a) That appellant has at any time made any representation as to the proportions in which the several ingredients are used in compounding his products, or
- (b) That any representation by appellant as to the therapeutic value of his product is false, or

- (c) That any purchaser or user of his product has asserted that any representation by appellant as to the therapeutic value of his product is false, or
- (d) That appellant's product does not possess the therapeutic value ascribed to it by him, or that it, or the ingredients of which it is composed, in any proportions, are or would be injurious in any respect to human health, or
- (e) That it is necessary to know the proportions in which said ingredients are used in compounding said products, in order to determine the therapeutic value of said products.

The ultimate fact sought to be established in said proceedings, is "*the therapeutic value*" of appellant's products when used in the manner recommended by appellant's advertisements, by persons in the condition therein described.

The facts as to the proportions in which the several ingredients are used in compounding these products, are not in issue. It is not claimed that appellant ever made any representation as to the proportions in which said ingredients are used. The facts in respect of said proportions are sought to be revealed that they may be used as a basis for the expression of an opinion by a medical expert, as to the therapeutic value of these products. The Commission proposes to use such opinions, if they

may be obtained, as a substitute for actual clinical observations of patients under treatment, in proof of the ultimate fact of the therapeutic value of these products.

This record does not support any conclusion that recourse to such *secondary* opinion evidence is necessary, at the expense of appellant's secrets and business, to ascertain the truth as to the therapeutic value of these products. The record confirms the conclusion that the *primary* evidences of clinical observations of the results of the use of these products, may be obtained reasonably. Clearly the observed evidences of the actual results of use, are higher and more satisfactory evidences of the therapeutic value of these products, than would be the opinions of medical experts based upon knowledge of the proportions in which these ingredients are used. It is universally accepted that "*Experience is of all teachers the most dependable.*" (*Funk v. U. S.*, 290 U. S. 371, 381.) . Within this concept that which one *experiences* from the actual use of appellant's products in the circumstances advertised is more dependable as evidence of therapeutic value than is any opinion of a medical expert.

Concise Statement of the Case.

The facts here are simple and not in dispute. Appellant is the owner of a secret formula for compounding a medicinal product for which he claims therapeutic value for building human blood. He has founded a substantial, expanding and profitable interstate business in the manufacture and sale of this product. He has revealed the ingredients which enter into its composition. He refuses to reveal the proportions of those ingredients as contained in his said products. He believes that a revelation of the proportions of his ingredients used in compounding his products would destroy the value of his secret formula and would ruin his business.

The Federal Trade Commission, upon a complaint which charges that appellant falsely advertises *the therapeutic value* of his products, seeks to compel appellant to reveal *the proportions* of the ingredients used in his compound, and urges that unless such revelation is made it will be unable to ascertain the truth or falsity of appellant's said advertisements. The complaint does not charge that appellant falsely advertised, or advertised at all, in respect of the proportions in which he used the ingredients of which his products are composed.

Appellant urges that the revelation desired is not required to establish the truth or falsity of appellant's advertisements for the reasons that the best and highest evidences of the therapeutic value of appellant's products may be obtained by clinical observations of the results obtained by the use of appellant's products, as advertised, in circumstances wherein appellant claims that said products have therapeutic value, and that all other evidences are inconclusive and of secondary importance.

The Federal Trade Commission asserts that its power to compel said revelation is within the breadth of its jurisdiction as conferred upon it by an act of Congress, commonly referred to as the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C. A. Sec. 49).

Appellant contends that said act of Congress does not, in terms, purport to grant such sweeping authority, and that if it did, such grant would be void as in derogation of the rights, immunities and privileges of appellant as guaranteed to him under the Federal Constitution, and particularly under the Fourth and Fifth Amendments thereto.

The Questions Involved.

I.

May the Federal Trade Commission, in a proceeding prosecuted by it against the owner of a secret formula for a medicinal compound, upon an allegation that the owner's advertisement of the therapeutic value of his compound is false and misleading, compel the owner to reveal the proportions of the ingredients used in his compound, when such therapeutic value may be determined by other and better evidences reasonably obtainable, and the revelation would destroy the value, to him, of his formula and his business builded thereon?

II.

May the Federal Trade Commission compel an owner of a secret formula for a medicinal compound, to reveal the proportions of the ingredients used in his compound, which evidence might be used against him in a criminal prosecution under the penal clauses of the Federal Statutes?

ARGUMENT.

This appeal presents, as of first impression under the Federal Trade Commission Act, two fundamentally important constitutional questions. Their proper answer is of great and far-reaching importance, both to the public acting through its constituted agencies, and to the individual members of society whose property and personal security, as guaranteed by the constitution, are at stake.

Concededly, public inquiry into the individual's conduct in respect of his person and property is an indispensable function of sovereignty, to the extent reasonably required to promote the public health, safety and morals. But it is of equal importance that the visitations of the sovereign be restrained within proper limits in order that the constitutional securities of the individual in his property and person shall not be unnecessarily infringed upon.

In its final analysis, the determination of the scope of legitimate inquiry and the restraint necessary to prevent an abuse of sovereign authority, present judicial and not legislative questions. Always, when the individual is required to perform for the public good, the courts have jealously guarded his constitutional immunities against unnecessary exactions. It has been said that: "It never was intended that the extent of a free man's duty to perform should be determined by those who demand performance." (*U. S. v. Basic Products Inc.*, 260 Fed. 472, 482.)

Appellant believes and urges that the demands made upon him by the Federal Trade Commission are unnecessary for the preservation of any public interest, and that the ruinous consequences of his compliance fully justify his refusal, and that the order appealed from is therefrom void as a denial to him of his constitutional immunities under the Fourth and Fifth Amendments to the Federal Constitution.

That the revelation of appellant's trade secret is not necessary to the ends of justice clearly appears from the fact that such revelation is neither the only means, nor the best means, by which the truth or falsity of appellant's advertising respecting the therapeutic value of his product may be determined. Clearly, knowledge of the proportions of the ingredients used by appellant would serve only as a basis for *an expert opinion* as to the therapeutic value of a product so compounded. Opinion evidence is never the equal of a demonstration. The best and higher evidence of the truth or falsity of appellant's representations of therapeutic value is *an actual demonstration* under proper clinical observation of the results obtained from the use of appellant's product in the circumstances related in the advertising. Such a demonstration of therapeutic value by the use of appellant's product in the circumstances related in his advertisements may be expeditiously and easily made. Therefore, there is no need for the revelation, and no justification for making public the secret formula which is the basis of appellant's business. These perfectly obvious facts bring this case squarely within the rule of protection.

I.

May the Federal Trade Commission, in a Proceeding Prosecuted by It Against the Owner of a Secret Formula for a Medicinal Compound, Upon an Allegation That the Owner's Advertisement of the Therapeutic Value of His Compound Is False and Misleading, Compel the Owner to Reveal the Proportions of the Ingredients Used in His Compound, When Such Therapeutic Value May Be Determined by Other and Better Evidences Reasonably Obtainable, and the Revelation Would Destroy the Value, to Him, of His Formula and His Business Built Thereon?

Indisputably it is a far cry between the day of the "gas light" peddler of patent medicine, in splendid isolation, and the modern complex distribution which covers the consumer's field like a mantle. Protective measures adequate to the former are inadequate to the latter. This was recognized by Wigmore in his treatise on Evidence, Third Edition, Volume 8, Section 2212, page 156, wherein the author states:

"In a day of prolific industrial invention and active economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense, and the like.

“Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as trade secrets.”

An individual's constitutional immunity to any compulsory revelation of the secrets of his trade or person extends, under eminent authority, to the point that disclosure will not be required “except in such cases and to such extent as may appear to be *indispensable* for the ascertainment of truth”. (Wigmore on Evidence, 3rd Ed., Vol. 8, Sec. 2212, p. 159.) The following cases state and apply this principle of determination.

In *Willson v. The Superior Court of Los Angeles County*, 66 Cal. App. 275, the court said:

“The policy of the law is unquestionably that of fostering and protecting trade secrets, as is shown by the laws affecting their registration, and *unless the interests of justice imperatively demand their disclosure*, a disregard of valuable property rights arising from enforced disclosure, whether by means of contempt proceedings or otherwise, approaches at least the confiscation of private property.”

In *Star Kidney Pad Company, et al. v. Greenwood*, 3 Ontario Reports page 280, the court, speaking at page 281, said:

“I think that the plaintiff's contention is right, and the defendant has no right to the discovery sought. It could scarcely serve any beneficial purpose for him to have a knowledge of the composition in making out a defense, for it seems to me it would be impossible for anyone with certainty to say, should the ingredients prove of the simplest character, cre-

ating no new substance in combination, that they might not be beneficial when applied to the human body in effecting relief from pain, or in promoting some chemical action in the system beneficial in some ailments. That question would have to be solved by the experience of the sufferer rather than the skill of an expert, and the composition of the pads having formed no part of the inducement of the defendant to buy them, I have not been able to see how the ends of justice can be served by compelling the plaintiffs to make disclosures that may destroy their business by enabling anyone without their assistance to make the pad, be it never so useful in the cure of disease, and this would, in that event, work manifest injustice.”

United States v. Basic Products Co., 260 Fed. 472, was a proceeding in which the Federal Trade Commission demanded access to the books and papers of a corporation which manufactured a patent article by secret process, for the purpose of obtaining information for the Labor Department as to the cost of manufacture, annual production, capital invested, etc. The defendant refused to reveal his secrets and the court in upholding its contention, speaking at page 482, said:

“An incident of such investigation is the ascertainment of trade secrets. It is plain that the cost of manufacturing a patented product to which the manufacturer has exclusive right may be a trade secret, a species of property of great value. This is also true of refinements of method in producing the same. The act prohibits the disclosure of trade secrets. The assumption that no such disclosure will be made disappears before the expressed intention to give the information to the Navy Department. We have, then,

a contemplated search and seizure, and a contemplated taking of private property for public use, without due process of law, which are violative of the Fourth and Fifth Amendments of the Constitution.”

In the case last cited the court pointed out (at page 475) that there was no complaint pending against the defendant in respect of the particular matter as to which the revelation was required. Similarly, we point out, that there is no complaint of the defendant here of any misrepresentation or of any representation at all as to the proportions in which he uses in his products the ingredients of which they are composed.

In *Federal Trade Commission v. American Tobacco Co.*, 68 Law. Ed. 696, the Supreme Court reviewed the attempt of the Federal Trade Commission to compel the production of all of the records of the defendant upon the ground that an examination thereof might disclose some evidence which would assist the Commission in the accomplishment of its purpose. The power which the Commission sought to exercise there was denied in an opinion which clearly reveals the intention of the courts to protect an individual from unreasonable search, seizure and disclosure. It is clearly laid down as a fundamental principle of determination that the power does not exist in the absence of a definite showing that by its exercise revelations would be made of evidences material to an actual as distinguished from a hypothetical issue. The court said, speaking at page 700:

“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of

its subordinate agencies to sweep all our traditions into the fire (Inters. Commerce Com. v. Brimson, 154 U. S. 447, 479; 38 L. Ed. 1047, 1058; 4th Inters. Com. Rep. 545; 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."

In *Federal Trade Commission v. P. Lorillard Co.*, 283 Fed. 999, the court, in respect of the powers of the Federal Trade Commission to compel disclosures, stated the rule of protection as follows:

"The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but *the exercise of visitorial power over private corporations must keep within restrictions of the Fourth Amendment*. 'Neither branch of the legislative department, still less any merely administrative body, established by the Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen'.

"Section 6 (b) grants to the Commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to

furnish to the Commission such information as it may require. A subdivision (a) of Section 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the Commission is entitled, *upon properly showing the probable cause*, to demand due disclosures and access to the inspection of any specific, *necessary*, and relevant papers, excluding such papers as may be privileged. In other words, *there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits*. Such a construction of subdivisions (a) and (b) of Section 6 would effectuate the intent of Congress and the procedure can be kept within constitutional limits. * * * *It was not intended to grant an unlimited power of inquisition or unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrong doing."*

It should be remembered that in the case at bar there is no charge that appellant advertised falsely, or at all, in respect of the proportions in which the ingredients of his products were used.

An interesting application of the rule is found in *Moxie Nerve-Food Co. v. Beach*, 35 Fed. Rep. 465. The factual situation and the holding of the court appear from the following quotation from that case. The court, speaking at page 466, said:

"The witness was asked in his direct examination as to the uses and effects of Moxie, or Moxie Nerve-

Food, for the terms are used interchangeably, but he was not asked as to the particular ingredient of Moxie, what it was, or the place or source from which it came. In spite of the contention of defendant's counsel to the contrary, it seems to me that this may fairly be considered the limit of the inquiry by the counsel for complainant. But aside from this, I have grave doubt whether the witness can be obliged, under the circumstances existing in this case, to disclose what is evidently a trade secret, the result of which might be to ruin his business."

In *DuBois v. Thomas*, 122 Southern 495, the Supreme Court of Mississippi states the circumstances in which disclosure will be required or denied and emphasizes the necessity, as a prerequisite to disclosure of trade secrets, of a definite issue, and showing that the evidence sought is material to that issue, and a necessity for disclosure in order that the issue may be determined. The court said, at page 495:

"A witness has a qualified, but not an absolute, privilege of refusing to disclose trade secrets when the disclosure thereof would depreciate their value. *He should not be compelled to disclose such secrets where so to do is not essential to the ends of justice; but where a trade secret is relative to an issue being tried and its disclosure is essential in order that the issue may be correctly determined and justice administered accordingly, a witness is not privileged to refuse to disclose it.* To hold otherwise would violate the general principle 'that testimonial duty to the community is paramount to private interest, and that no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced'."

It is settled law that contempt may not be predicated upon one's refusal to answer a question which is not material to the issue. The following cases declare this rule: *Levy v. Superior Court*, 74 Cal. App. 171; *In re Moore*, 93 Cal. App. 488; *Ex parte F. J. Zeehandelaar*, 71 Cal. 238.

The case at bar must not be confused with cases which have required a revelation of the ingredients used and of the proportions of their use wherein these matters are directly in issue. We remind the court that in the case at bar the appellant has revealed his ingredients. He has refused only to reveal the proportions in which those ingredients are used. There is no charge in the complaint that he has ever advertised falsely, or at all, as to the proportions in which he uses these ingredients, or that the therapeutic value of his products cannot be determined excepting by a disclosure of the proportions of those ingredients. Cases in which disclosures have been held and wherein the factual distinctions from the case at bar are clearly shown, include *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. Rep. 812; *Moxic Nerve-Food Co. v. Modox Co.*, 152 Fed. 493; *Worden v. California Fig Syrup Co.*, 187 U. S. 516; *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 155 Fed. 964, and *Coca-Cola Co. v. Joseph C. Wirthman Drug Co.*, 48 Fed. (2d) 743.

The good faith of this appellant is shown by his offer to bear the expense of "any tests which are necessary or advisable to determine the efficiency of this product in the matter now pending before the Federal Trade Commission. I make that stipulation in open court and for all purposes in this proceeding." [Tr. of Rec. p. 115.]

Clearly, these evidences, for the ascertainment and production of which appellant offered to pay, are the best evidences of the truth or falsity of appellant's advertisements respecting the therapeutic value of his products. no reason is shown why the Commission is unwilling to avail itself of these primary evidences but insists upon an unnecessary and ruinous disclosure of trade secrets which concern only matters not in issue under the Commission's complaint against this appellant.

In conclusion upon this subject we respectfully submit that in the absence, as here, of a charge that appellant advertised the proportions in which he used the ingredients of which his products are composed, and that such advertisements were false, there is no issue to which a disclosure of that trade secret may be directed, or any ground upon which it may be required. Appellant has fairly and fully revealed to the Commission everything necessary to a determination upon primary evidences of the therapeutic value of his products. The therapeutic value of his products and his advertising in relation thereto are the only subjects in issue here. Excursions desired by the Commission into further trade secrets of appellant are simply fishing expeditions sought to be conducted in the hope that thereby there may be revealed some evidence of wrong-doing on the part of this appellant not charged in the complaint and as to which the Commission professes its ignorance and its inability to be informed excepting upon such a disclosure. We respectfully submit that however laudable the Commission's desire, in its own estimation, to permit its fruition would be clearly violative of the immunities of this appellant in the enjoyment of his property under the Fourth and Fifth Amendments to the Federal Constitution.

II.

May the Federal Trade Commission Compel an Owner of a Secret Formula for a Medicinal Compound, to Reveal the Proportions of the Ingredients Used in His Compound, Which Evidence Might Be Used Against Him in a Criminal Prosecution Under the Penal Clauses of the Federal Statutes?

It is a fair import upon this record that the Commission desires this disclosure to procure evidences from this appellant which the Commission suspicions may be useful in a prosecution of this appellant under the criminal provisions of the Federal Statutes. That suspicion motivates the Commission's inquiry, clearly appears from the unsubstantial grounds upon which the Trial Examiner predicated his direction to appellant to make the disclosure. At page 66 of the Transcript of Record in this case the following statement of the Trial Examiner appears:

“By Mr. Lyon:

Q. Yes, what are the proportions of those different ingredients? A. Of course, that is my trade secret.

Trial Examiner Reardon: Do you object?

Mr. Soper: Yes, I do.

Trial Examiner Reardon: I will have to overrule the objection and direct the witness to answer.

The Witness: Well, I would be divulging all my trade secrets.

Trial Examiner Reardon: I know that, but I can't help that. I have to direct you to answer. You are selling the product, and we are entitled to know.

The Witness: Well, I decline to answer, to divulge this trade secret.

Mr. Soper: As I understand it, Mr. Clarke, you art not unwilling to let the Commission know that you actually use liver?

The Witness: Oh, no. No, I can show you bills for thousands of dollars from the Swift Company, showing that I used liver, and I am not buying liver just to go out and throw it away and just to tell the Federal Trade Commission."

It is settled law that one may not be compelled to furnish evidence, in such circumstances, which may be used as the basis of a criminal prosecution against him.

In *Federal Trade Commission v. Smith*, 34 Fed. Rep., Second Series, 323, the court, speaking at page 324, said:

"And even as to interstate business, petitioner, *in the absence of a well founded basis*, cannot say to a suspected corporation '*Stand and deliver the possible evidences of the crime of which you are suspected*'. *Federal Trade Commission v. American Tobacco Co., supra*; *Federal Trade Commission v. Baltimore Grain Co. (D. C.)*, 284 F. 886, affirmed 267 U. S. 586, 45 S. Ct. 461, 69 L. Ed. 800. A time may come when petitioner will have established the reasonableness of a demand for particular papers or books from Electric Bond and Share Co. but it does not appear to have arrived. So far, *the suggestion that the corporation may, perhaps, have violated the anti-trust laws, rests only on hearsay or suspicion.*"

In *Counselman v. Hitchcock*, 142 U. S. 547; 12 Supreme Court 195, 35 Law. Ed. 1110, the Supreme Court substantially stated that this rule of personal guarantee and protection was not limited to a criminal prosecution but that it applied to a witness in an investigation.

In conclusion we respectfully submit that for the reasons herein stated, and upon the authorities herein referred to, the order appealed from is void because it denies to this appellant the immunities and protection to his property and his person as guaranteed by the Fourth and Fifth Amendments to the Federal Constitution.

We respectfully submit that the order appealed from should be reversed.

OLIVER O. CLARK,

ROBERT A. SMITH,

Attorneys for Appellant.

No. 9948

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**FREDERIC A. CLARKE, SOMETIMES KNOWN AS FREDERICK
A. CLARKE, APPELLANT**

v.

FEDERAL TRADE COMMISSION, APPELLEE

**ON APPEAL FROM DECREE ADJUDGING APPELLANT GUILTY OF
CONTEMPT OF COURT**

BRIEF FOR APPELLEE

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PAUL F. OWEN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9948

FREDERIC A. CLARKE, SOMETIMES KNOWN AS FREDERICK
A. CLARKE, APPELLANT

v.

FEDERAL TRADE COMMISSION, APPELLEE

*ON APPEAL FROM DECREE ADJUDGING APPELLANT GUILTY OF
CONTEMPT OF COURT*

BRIEF FOR APPELLEE

I

STATEMENT OF THE CASE

This is an appeal from an order (R. 102-105) of the United States District Court for the Southern District of California, Central Division, Honorable Ben Harrison, Judge, adjudging appellant guilty of and committing him for contempt of court because of his refusal to obey orders (R. 8-9, 81-83) previously entered by that court requiring appellant to give certain testimony in a proceeding pending before the Federal Trade Commission.

Appellant is engaged in the business of manufacturing and selling in interstate commerce a drug variously designated as "Bonquet Blood Building Tablets," "Bonquet Hemo-Tabs," and "Bonquet Tablets," in

connection with which he has disseminated numerous advertisements and circulars respecting its contents and therapeutic value. Among the statements made by him is the following:

“What are Boncquet (Bon Kay) Tablets? They constitute a food, not a drug. Comparatively recent scientific discoveries prove that the best blood builder is composed of these ingredients: Active Principle of Raw Liver, Vegetable Iron, Vitamins B and G. Boncquet Blood Building Tablets are guaranteed to contain the above ingredients in effective therapeutic amounts. Boncquet Tablets are scientifically processed to retain maximum Vitamins A, B, E, and G and essential minerals in their true organic colloidal form, easily assimilated and are strongly alkaline. They are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, vegetable and animal hemopocitins (blood makers). They also contain a rich supply of milk minerals giving to the body calcium and phosphorus in their true and natural proportions as found in milk.” R. 39-40.

As to the therapeutic value of his Boncquet Tablets appellant asserted, among other things, that they “increase the number and color of your blood corpuscles * * * increase the blood’s energizing power, and its capacity to burn toxic poisons,” “nourish and stimulate the bone marrow [building] new red blood cells, rich in hemoglobin,” and entirely “rebuild to normal, thin, weak, anemic blood * * * with new, rich, fighting blood” in less than a month. (R. 40, 41.)

Having reason to believe, upon the basis of a preliminary investigation, that appellant’s claims with respect to Boncquet Tablets were untrue, the

Federal Trade Commission, acting in the public interest, on December 8, 1938, issued a formal complaint against appellant charging that his advertisements were false, deceptive and misleading and constituted "unfair and deceptive acts and practices in commerce" violative of Sec. 5 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45.¹ (R. 37-44.)

After appellant had filed his answer to the complaint the matter was set down for the taking of testimony, and appellant was duly subpoenaed by the Commission to appear and testify in the proceeding. (R. 3, 4, 18, 25, 51, 111.) He did appear, but on three different occasions, July 20, 1939 (R. 25-26), July 22, 1939 (R. 26-27), and June 13, 1940 (R. 27-28), he refused to answer any questions whatever. Thereafter, on May 22, 1941, the Commission, proceeding under Sec. 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49, filed with the United States District Court for the Southern District of California, Central Division, an application for an order requiring appellant to appear and testify. (R. 2-7.) Upon this application an order was duly entered and filed May 23, 1941, requiring appellant to appear in the proceeding and answer all relevant and material questions propounded to him by counsel for the Federal Trade Commission and to attend before the Commission's Trial Examiner from day to day until his examination shall have been completed. (R. 8-9.)²

¹ Pertinent provisions of the Federal Trade Commission Act are set forth as an Appendix to this brief, *infra* pp. 32-35.

² This application was made and the order taken *ex parte*. The statute does not require the giving of notice upon such application

Having been personally served with a copy of this order on June 4, 1941, appellant appeared before the Commission's Trial Examiner on July 7, 1941, but, upon being questioned in that connection by counsel for the Commission, and directed by the Trial Examiner to reply, he refused to state the quantitative analysis or proportions of the different ingredients used in the manufacture of Boncquet Tablets, contending that this information constituted a trade secret which he was privileged to refuse to reveal. (R. 30-35, 61-81.)³ Thereupon, on application of the Commission (R. 24-47), appellant was ordered, on July 14, 1941 (R. 48), to show cause why he was not in contempt of the court's order of May 23, 1941. Subsequently, after notice and hearing in open court (R. 109-126), the

(compare *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692, 694 (C. C. A. 10th, 1941); *National Labor Relations Board v. Ritholz*, 3 Fed. Rules Serv. 9 (N. D. Ill. 1940)), and no notice was given to appellant in this instance for the reason that when he was served with notice of a previous application he absented himself from the jurisdiction of the court with the result that service of the order entered thereon could not be effected. (R. 5, 15.) Appellant makes no point in his brief or Statement of Points on Appeal (R. 140-141) of the fact that the order of May 23, 1941, was issued *ex parte*. Nor could he, for not only does the statute not require notice of an application for an order requiring a witness to appear and testify, but appellant subsequently entered his appearance by motion to vacate this order (R. 9-10), which motion was duly heard and denied. (R. 29-30.) Appellant was notified of the application for and appeared to contest the entry of the order of July 18, 1941, in which he was again ordered to appear and testify. (R. 81-83. See also R. 133-136.)

³ There is no secret about the *kinds* of ingredients used. They are, so it is asserted, stated on appellant's labels and he testified as to what they were. (R. 32, 61, 65-66.) The claimed trade secret relates only to the *quantities* of the ingredients used. Appellant also claimed that his method of manufacturing Boncquet Tablets was a trade secret. (R. 70-71.) He was not asked to disclose that, however, as counsel for the Commission did not believe it to be necessary to a determination of the truth or falsity of appellant's representations as to the composition or therapeutic value of his product.

court entered its order of July 18, 1941, again directing appellant to appear as a witness in the Federal Trade Commission proceeding and specifically to "answer the question, 'What are the proportions of the different ingredients in the product Bonquet Tablets?', and to answer any and all other relevant and proper questions respecting the quantitative formula for his product Bonquet Tablets." (R. 81-83.)⁴

Pursuant to this order appellant appeared before the Commission's Trial Examiner but again refused to state the quantitative analysis or the proportions of the different ingredients used in the manufacture of Bonquet Tablets. (R. 86-88, 110, 111-112, 116-117.) He was then ordered to show cause why he should not be adjudged in contempt of court (R. 94-96), and after notice and hearing in open court (R. 131-139) on July 30, 1941, was held in contempt of the court's orders of May 23, 1941, and July 18, 1941, and ordered committed until he should purge himself of such contempt "by answering the question, 'What are the propor-

⁴This order of July 18, 1941, also adjudged that appellant was "guilty of contempt * * * in refusing to obey the order of this court entered May 23, 1941, in refusing to answer lawful and relevant questions propounded to him on July 7, 1941" in the Commission's proceeding against him, but, as the order further stated, it "appearing to the court that [appellant] should be afforded an opportunity to purge himself of contempt by again appearing before the trial examiner of the Federal Trade Commission and answering the questions which he has heretofore refused to answer," he was not committed at the time. (R. 82.) Subsequent to the entry of this order, and upon final hearing of the order to show cause filed July 28, 1941 (R. 94-96), the court stated that it had not intended by its order of July 18, 1941, to adjudge appellant in *contempt* at that time, but merely to direct him "to answer a question instead of finding him in contempt * * * to give him an opportunity to purge himself" by answering the question at the hearing at which he was then ordered to appear. (R. 133-136.)

tions of the ingredients used in Boncquet Tablets?’ ” (R. 102-105.)

It is from this contempt and commitment order of July 30, 1941, that appellant brings this appeal. (R. 105-106.)

II

QUESTIONS PRESENTED

The following questions are presented:

1. May the appellant on this appeal question the propriety of the court's orders of May 23, 1941, and July 18, 1941, directing him to testify in the Commission's proceeding? We submit that he may not; but if he may, then:

2. Does appellant's privilege against self-incrimination excuse him from complying with the court's orders directing him to testify? We say not.

3. Is the formula for Boncquet Tablets relevant and material to the Commission's proceeding? We maintain that it is.

4. Is the appellant privileged under the Fourth Amendment to the Federal Constitution, or otherwise, to refuse to disclose the formula for Boncquet Tablets in the Commission's proceeding against him? We say that he is not so privileged.

III

ARGUMENT

1. Introductory

The facts herein are not disputed and are set forth in our statement of the case, *supra* pp. 1-6. There is

no question but that appellant, asserting a privilege against the disclosure of trade secrets, has refused to comply with the orders of the court below directing him to testify in the Federal Trade Commission proceeding now pending against him and to disclose the quantity of each of the several ingredients used in the manufacture of Boncquet Tablets.

2. Appellant May Not in This Proceeding Question the Propriety of the Court's Orders Directing Him to Testify

Appellant appeals not from the lower court's orders directing him to testify, but from the order adjudging him in contempt and committing him for violating those orders. It cannot be denied that the court had personal jurisdiction over the appellant, and, under Sec. 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49, jurisdiction over the subject matter of the Commission's application to compel him to appear and testify. That being true, the court's orders entered thereon clearly were not void.⁵ The most that appellant can contend is that the orders were erroneous—and that is no defense to an action to punish him for violating them.

An order entered by a court having jurisdiction of the parties and the subject matter may not be collaterally attacked in contempt proceedings. This is true, however erroneous or improvident the order may be; and the fact that it was erroneously or improvidently granted will not excuse disobedience of it.

⁵The order of May 23, 1941 (R. 8-9), was personally served on appellant on June 4, 1941 (R. 29). The order of July 18, 1941 (R. 81-83), was made in open court in the presence of the appellant and his counsel. (R. 86-88, 92-93, 100, 125.)

The remedy of the complaining party is by appeal from the order; until vacated it is binding upon him and, unless absolutely void for lack of jurisdiction, its validity cannot be challenged upon appeal from a decree punishing him for its violation. 6 R. C. L. 505; 17 C. J. S. 21, 165-166. As declared in *Brotherhood of Railway & S. S. Clerks v. Texas & N. O. R. Co.* 24 F. 2d 426, 427 (S. D. Tex. 1928):

“It is fundamental that ‘a person proceeded against’ in a contempt case ‘for disobeying an injunction can never set up as a defense that the court erred in issuing it. * * * Errors must be corrected by appeal, and not by disobedience.’ * * * And ‘that a respondent in a contempt case may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void.’”

The rule was thus stated in *Howat v. Kansas*, 258 U. S. 181, 189-190 (1922):

“An injunction duly issuing out of a court of general jurisdiction * * * must be obeyed * * * however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.”⁶

Appellant did not appeal from the court's orders directing him to state the quantitative analysis of his tablets; he elected instead to leave the validity of the

⁶ See also *Drew v. Superior Court*, 47 Cal. App. 150, 190, P. 374, 376 (1920); *Beauchamp v. United States*, 76 F. 2d 663, 668 (C. C. A. 9th, 1935).

orders unchallenged and to defy the court which entered them. As we shall hereafter show, *infra* pp. 12-31, those orders were entirely lawful and proper in every respect; but if that were not the case, the orders having been entered in a cause in which the court's jurisdiction over the appellant and the subject matter is not questioned, and not having been set aside or reversed, their validity and propriety are not subject to review in this proceeding. The appellant is clearly in contempt of them, and the lower court's order so adjudging and committing him should be affirmed.

On this clear ground alone, we submit, appellant's appeal can be disposed of. We do not mean to imply otherwise by passing on to a discussion of the other questions raised.

3. The Privilege Against Self-Incrimination Does Not Excuse Appellant From Complying With the Court's Orders to Testify

At pp. 20-22 of his brief appellant contends that he is privileged to refuse to disclose the formula for Bonequet Tablets on the ground that such evidence "may be used as the basis of a criminal prosecution against him." He fails, however, to indicate in what manner this would or might occur, resting his claim upon a bare assertion of the privilege against self-incrimination. A complete answer to the contention would seem to be found in this Court's ruling in *Graham v. United States*, 99 F. 2d 746, 750 (C. C. A. 9th, 1938), to the effect that:

"[A witness'] mere assertion, however advanced, that in his opinion the answer to a given question would tend

to incriminate him is not sufficient to justify the witness in refusal to answer unless and until a sufficient showing is made to the court that the claim of the witness is a substantial one. That is, the court must be convinced that the answer of the witness would be calculated to incriminate him if he was guilty of an offense foreshadowed by the question."

Further than this, appellant did not claim a privilege against self-incrimination when he declined to disclose his formula. He was expressly asked by the Trial Examiner, "Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?" His reply was, "Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights." (R. 34, 67, 112.)

The claim of the privilege is made for the first time in appellant's brief on this appeal, not even being set forth in his statement of points intended to be relied on herein. (R. 140-141.) In these circumstances the privilege must be deemed to have been waived, for its availability depends "not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made." *United States v. Murdock*, 284 U. S. 141, 148 (1931); 6 Jones, *Evidence* (2nd ed., 1926) Secs. 2489, 2493. As said in *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 113 (1927), a case in which, as here, the appellant did not assert his privilege against self-incrimination below but claimed it for the first time on appeal:

"His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the

witness that the answer sought will incriminate him,
 * * * a determination which it cannot make if not
 advised of the contention. * * * The privilege
 may not be relied on and must be deemed waived if not
 in some manner fairly brought to the attention of the
 tribunal which must pass upon it.”

Finally, it may be said, whatever merit might
 otherwise attach to appellant’s claim, Sec. 9 of the
 Federal Trade Commission Act, 15 U. S. C. A. Sec.
 49, deprives it of all substance. That section provides:

“No person shall be excused from attending and testi-
 fying or from producing documentary evidence before
 the commission or in obedience to the subpoena of the
 commission on the ground or for the reason that the
 testimony or evidence, documentary or otherwise, re-
 quired of him may tend to criminate him or subject
 him to a penalty or forfeiture. But no natural person
 shall be prosecuted or subjected to any penalty or for-
 feiture for or on account of any transaction, matter, or
 thing concerning which he may testify, or produce evi-
 dence, documentary or otherwise, before the commission
 in obedience to a subpoena issued by it * * *.”

The immunity thereby afforded appellant is com-
 plete. That being true, having been duly subpoenaed
 by the Commission⁷ and ordered by the Court⁸ to
 appear and testify, appellant cannot excuse his failure
 to do so on the ground that his testimony might have
 or would incriminate him. The “constitutional guar-
 antee of the Fifth Amendment does not deprive the
 law-making authority of the power to compel the giv-
 ing of testimony even although the testimony when
 given might serve to incriminate the one testifying,

⁷ R. 3, 4, 18, 25, 51, 111.

⁸ R. 8-9, 81-83, 125.

provided immunity be accorded.” *Glickstein v. United States*, 222 U. S. 139, 141 (1911); *Hale v. Henkel*, 201 U. S. 43, 66 (1906).

4. Appellant's Formula For Boncquet Tablets Is Relevant and Material Evidence in the Commission's Proceedings Against Him

Appellant is in error in stating on p. 18 of his brief (see also pp. 7, 14, 16) that “There is no charge in the complaint that he has ever advertised falsely * * * as to the proportions in which he uses [various] ingredients.” Since the complaint challenges the truth of appellant's statements respecting the therapeutic value of his product, as he recognizes at pp. 5, 7, 18 and 19 of his brief, the quantity of each of the ingredients used in compounding it is necessarily also questioned, for without knowledge of the quantity as well as the kinds of ingredients employed in its manufacture its therapeutic value obviously cannot be determined.

In addition to this, the Commission's complaint (R. 37-44) expressly charges that appellant's representations “descriptive of [his] drug and of its effectiveness in use” are false. (R. 42.) Among the representations thus challenged are those to the effect that Boncquet Tablets “constitute a food, not a drug,” that they “are guaranteed to contain [specified] ingredients in effective therapeutic amounts” (R. 39), and that they “are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, [and] vegetable and animal hemopocitins.” (R. 39-40.) The complaint therefore places directly in issue not

only appellant's claims respecting the therapeutic value and effectiveness of his product, but also his claims as to its quantitative contents—it challenges appellant's assertions as to what his preparation is, as well as his assertions as to what it does. The truth of his claims as to the effective amounts and nature of the ingredients contained in Bonequet Tablets being in issue, evidence of their quantitative composition is as clearly relevant as is evidence of their qualitative composition,⁹ and appellant does not contend that evidence as to the latter is irrelevant or immaterial.

Not only is evidence as to the quantitative analysis of appellant's formula relevant and material, it is *essential* to the Commission's case, for without it the Commission cannot determine the truth or falsity of appellant's representations, as it was shown by qualified experts that the quantities of the various ingredients used by appellant cannot be ascertained by chemical or microscopic analyses or by any other known tests.¹⁰ This was apparently demonstrated to the satisfaction of the lower court which declared "that in order to ascertain the facts it will be *necessary* for the witness to answer the question" calling for a statement of the quantitative contents of his preparation. (R. 123. Italics supplied.)

⁹ As the court stated in *Horlick's Malted Milk Co. v. Spiegel*, 155 Wis. 201, 144 N. W. 272, 277 (1913), "The ingredients of the plaintiff's product involved a vital issue in the case, because it was necessary to determine whether plaintiff's product was what it was represented to be; therefore the evidence as to what the ingredients are was relevant to the issue."

¹⁰ Transcript of testimony before the Commission, pp. 253-258, 262, 266, 268, 272, 275. See also R. 31, 64-65.

Appellant also argues that this evidence is irrelevant and immaterial because intended to “be used [by the Commission] as a basis for the expression of an opinion by a medical expert, as to the therapeutic value” of appellant’s tablets. (Appellant’s brief, p. 5.) He contends that such evidence is “*secondary opinion evidence*” (*id.* p. 6) to which it is unnecessary and improper to resort in view of the fact that “primary evidences of clinical observations of the results of the use of” his product may be obtained. (*Id.* pp. 6, 10, 18–19.) It is to be observed that appellant cites no authorities to support this argument, which proceeds upon a misconception of the so-called “best evidence” rule.

Apart from a few exceptions, such as the preference for an attesting witness, “there is *no general principle* that the ‘best evidence’ must be procured, in the sense that a *specific witness, presumably better qualified* than other competent witnesses, *must be produced or accounted for* before the others can be used.” 4 Wigmore, Evidence (3rd ed., 1940) Secs. 1286, 1338. The rule “has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable.” 2 Jones, *op. cit. supra*, 1400. The so-called best evidence rule relates to documents, and does no more than merely prohibit the proof of “the contents of a * * * written instrument * * * by parol when the instrument itself can be produced.” *Id.*, 1400, 1401, 1404.

It is well established that the opinions of properly qualified medical experts are competent upon the ques-

tion of the therapeutic value and effect of drugs.¹¹ And this is true notwithstanding the fact that the witnesses might have had no experience in their actual use.¹² Thus in the recent case of *Justin Haynes & Co. v. Federal Trade Commission*, 105 F 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939), it was contended that the Commission's findings that a certain preparation was of little or no therapeutic value should be set aside for the reason that the experts upon whose testimony the Commission relied had had no personal experience with the preparation. The court rejected this contention, stating:

"These findings are supported by the testimony of the three expert witnesses called by the Commission; and in the light of such testimony there can be no doubt that the petitioner's advertisements were grossly exaggerated and misleading. It is true that these witnesses had no personal experience with Aspirub and based their opinions upon their general medical and pharmacological knowledge. They were, however, well-qualified expert witnesses, and the fact that other experts called by the petitioner expressed a contrary opinion and testified to experiments cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings."

¹¹ *Alberty v. Federal Trade Commission*, 118 F. 2d 669 (C. C. A. 9th, 1941), cert. denied — U. S. —, October 13, 1941; *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. 2d 886 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935); *Manhattan Oil Co. v. Mosby*, 72 F. 2d 840, 844 (C. C. A. 8th, 1934), cert. denied 293 U. S. 623 (1934); *W. B. Wood Mfg. Co. v. United States*, 292 F. 133 (C. C. A. 8th, 1923); *Kar-Ru Chemical Co. v. United States*, 264 F. 921, 928 (C. C. A. 9th, 1920); *Eleven Gross Packages v. United States*, 233 F. 71 (C. C. A. 3rd, 1916); *Samuels v. United States*, 232 F. 536, 542 (C. C. A. 8th, 1916); *Moses v. United States*, 221 F. 863, 868-870 (C. C. A. 2nd, 1915); 2 Wigmore, *op. cit. supra*, Sec. 569; 3 Jones, *op. cit. supra*, 1345; 22 C. J. 544.

¹² *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *State v. Donovan*, 128 Iowa 44, 102 N. W. 791, 793 (1905); *Boswell v. State*, 114 Ga. 40, 39 S. E. 897, 898 (1901).

Still more recently the rule was approved by the Fourth Circuit in *Neff v. Federal Trade Commission*, 117 F. 2d 495, 496-497 (C. C. A. 4th, 1941), where it was said:

"[Petitioner] argues that where there is direct testimony based upon actual experience, the opinion evidence of experts based upon general knowledge of a subject must be disregarded, and hence the finding of the Commission in this case cannot be deemed to be supported by substantial evidence * * *.

"The actual question now presented is whether the testimony of the six experts who testified for the Commission can be considered substantial evidence in view of their lack of actual experience in the use of the petitioner's preparation, as compared with the conflicting statements of doctors who had administered Glantex to their patients. We think that the evidence is sufficient to support the Commission's finding. All of the experts were well qualified to speak upon the subject; and their opinions, though based only upon their general medical and pharmacological knowledge, constituted substantial evidence tending to show that the representations of the petitioner were not justified."

To the same effect is *Goodwin v. United States*, 2 F. 2d 200, 201 (C. C. A. 6th, 1924), where the court held:

"Upon the trial of the issue of fact joined by the libel charging the misbranding of mineral water and the answer of the intervener, expert evidence may be properly admitted. If it appears from the testimony of a witness upon preliminary examination that he is learned in the science of chemistry or has been regularly and legally admitted to the practice of medicine, and that he has knowledge of the drug elements contained in the article transported in interstate commerce and their efficacy or lack of efficacy as curative agents, used either

separately or in combination in the treatment of the diseases specified on the label, his opinion on that subject is competent evidence regardless of whether he has had actual experience or observation of the effect of the use of such drugs * * *.”

It has indeed been held that individual case histories are not competent to establish the therapeutic effect of medical preparations, as was declared in *Commonwealth v. Jacobson*, 183 Mass. 242, 66 N. E. 719, 721 (1903), *aff'd sub nom. Massachusetts v. Jacobson*, 197 U. S. 11 (1905), where the defendant offered to prove by case histories that vaccination against smallpox was inefficacious and dangerous. The Supreme Judicial Court of Massachusetts held that the exclusion of such evidence was proper, stating:

“The only ‘competent evidence’ that could be presented to the court to prove these propositions was the testimony of experts giving their opinions. It would not have been competent to introduce the medical history of individual cases.”¹³

The quantities of the various ingredients employed in the preparation of appellant’s tablets may be so great as to be harmful or dangerous to human life or so small as to have no therapeutic effect or value. In

¹³ Compare *United States v. Lee*, 107 F. 2d 522, 526-527 (C. C. A., 7th, 1939), cert. denied 309 U. S. 659 (1940); *United States v. 141 Bottles*, U. S. Dept of Agriculture Notices of Judgment under the Food and Drugs Act, 7901-9000, Notice No. 8360, p. 232, 234 (S. D. Tex. 1919), *aff'd sub nom. Hall v. United States*, 267 F. 795 (C. C. A. 5th, 1920) (where the district court said, “* * * the slightest reflection upon the well-known fact that persons given to self-medication are credulous and partisan, and prone to deny nature credit for their recovery, and that on this well-known trait of human nature these compounders of specifics and nostrums build their business, deprives [testimonial letters about cures in specific cases] of any weighty significance; because it will not do for a person who has been able to prey upon the credulity of a community to escape the consequences of his acts by the very success of his scheme”).

either case, his representations would be false and misleading. Their truth or falsity cannot be established except by expert testimony based on an accurate knowledge of the quantitative contents of his preparation. The question calling for a disclosure of this information is clearly relevant and material and the testimony of medical experts as to its effectiveness and therapeutic value is competent.

5. Appellant Is Not Privileged Under the Fourth Amendment to the Federal Constitution, or Otherwise, From Disclosing His Formula For Bonquet Tablets

Appellant contends that the lower court's orders directing him to state the proportions of various ingredients used in the manufacture of his tablets are in "violation of appellant's rights under the Fourth Amendment to the Constitution of the United States," prohibiting unreasonable searches and seizures. (R. 140. Appellant's brief, pp. 8, 10, 22.) He cites no cases to support this contention, which, we think, is clearly without merit.

The Fourth Amendment relates to "unreasonable searches and seizures"; it has no application to the problem of testimonial compulsion. Appellant's argument that the lower court's orders directing him to testify in the Commission's proceeding violates the Fourth Amendment "is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers". *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 145 (1937).¹⁴

¹⁴ *Olmstead v. United States*, 277 U. S. 438, 463-465 (1928); *Boyd v. United States*, 116 U. S. 616, 630, 632 (1886); *Nuclein v. District of Columbia*, 115 F. 2d 690, 692-693 (App. D. C. 1940); *Federal Trade Com-*

Appellant also contends that the orders of the lower court directing him to testify are void for the reason that they require him to disclose a valuable trade secret which he is privileged to refuse to reveal. (Appellant's brief, pp. 11-19.)

It is well settled that there is no absolute privilege to refuse to disclose a trade secret. Where such a secret is relevant "to an issue and disclosure [is] essential to a correct determination, a witness is not privileged to refuse to disclose it." 70 C. J. 743; 6 Jones, *op. cit. supra*, 4910. Wigmore states that "the presumption should be against" the privilege, that:

"* * * A person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain. * * * [The] occasion for demanding such a privilege arises usually in actions where the party claiming it is one charged with * * * wrongful competition in business, and * * * in such cases, it might amount practically to a legal sanction of the wrong if the Court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation. No privilege at all should there be conceded * * *. [Even] where the claimant of the privilege is not a party charged with fraud, *no privilege of secrecy should be recognized if the rights of possibly innocent persons depend essentially or chiefly, for their ascertainment, upon the disclosure in question.*

"In short, the privilege should be conceded in those cases only where the disclosure of the facts by the particular channel of the witness in question is but a *subordinate* means of proof, relative to the other evidence

mission v. National Biscuit Co., 18 F. Supp. 667, 671 (D. C. N. Y. 1937); *In re Keegan*, 18 F. Supp. 746, 747-748 (D. C. N. Y. 1937); *McMann v. Engel*, 16 F. Supp. 446, 448 (S. D. N. Y. 1936), *aff'd sub nom. McMann v. Securities & Exchange Commission*, 87 F. 2d 377 (C. C. A. 2nd, 1937), cert. denied, 301 U. S. 684 (1937).

available in the case; for without some such limitation the general principle cannot be enforced that *testimonial duty to the community is paramount to private interests* * * *.” 8 Wigmore, *op. cit. supra*, Sec. 2212. Italics supplied.

At most the privilege to refuse to disclose trade secrets is a limited or qualified privilege. None of the cases cited by appellant holds that it is absolute, none of them supports appellant's contention that he is entitled to invoke it in this case, and we have been able to find none.

In *Star Kidney Pad Co. v. Greenwood*, 3 Ontario Rep. 280 (1883), cited by appellant on p. 12 of his brief, plaintiff sued to recover the purchase price of certain kidney pads sold to the defendant, who pleaded a failure of consideration in that the pads were of no curative or healing value and demanded that the plaintiff disclose their composition. Plaintiff contended that the defendant had not been induced to buy the pads upon the basis of any representations in that connection and that it would be injurious to the plaintiff to be compelled to disclose the trade secret by which they were manufactured. The court held that in these circumstances, the defendant having testified that none of the representations which induced his purchase of the pads “related to what the pad was made of” (3 Ontario Rep. at 281), he was not entitled to a discovery of the plaintiff's trade secret, that “the defendant's defence does not depend upon the composition of the pad * * * as its composition was in no sense a part of the consideration for [their] purchase * * *.” (*Id.* at 283.) The court

therefore regarded the evidence as immaterial, and declared that it was not moved "to exercise its power to compel a discovery" of the information sought. (*Ibid.*) It will be noted that so far from holding that there is an absolute privilege against the disclosure of trade secrets, the court clearly recognized its power to compel their disclosure in a proper case and based its refusal to do so in this instance upon the ground that the secret was immaterial. In the instant case, as heretofore shown, appellant's trade secret is not immaterial, a fact which clearly distinguishes this case from the *Kidney Pad* case.

United States v. Basic Products Co., 260 F. 472 (W. D. Penn. 1919), cited on p. 13 of appellant's brief, merely holds that in the exercise of its *investigative* powers under Secs. 6 and 9 of the Federal Trade Commission Act, 15 U. S. C. A. Secs. 46, 49, the Commission is not entitled to access to the books and papers of a corporation not alleged to be engaged in interstate commerce nor charged with a violation of the Act. Unlike the principal case, no complaint had been filed against the defendant there, and the court's reference to the disclosure of trade secrets as an objectionable "incident of such investigation" was dictum.

In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 (1924) and *Federal Trade Commission v. P. Lorillard Co.*, 283 F. 999 (D. C. N. Y. 1922), aff'd 264 U. S. 298 (1924), cited on pp. 14 and 15 of appellant's brief, it was simply held that the Federal Trade Commission, in conducting investigations unders Secs. 6 and 9 of the Federal Trade

Commission Act, was not entitled to an *unlimited* right of access to the defendants' papers, relevant and irrelevant, and some of which related to intrastate commerce only, on the possibility that they might disclose evidence of violation of law. As in the *Basic Products* case, no formal complaint had been filed against the defendants in either of those cases.

Moxie Nerve-Food Co. v. Beach, 35 F. 465 (C. C. Mass. 1888), cited on p. 16 of appellant's brief, went no further than to hold that a witness could not on cross-examination be required to state the ingredients of a tonic when the question exceeded the scope of his direct examination. The court's recognition of the fact that there is no absolute privilege against the disclosure of trade secrets is implicit in its dictum to the effect that it had "grave doubt whether the witness can be obliged, *under the circumstances existing in this case*, to disclose" the secret. (35 F. at 466. Italics supplied.)

The remainder of the cases relied on or sought to be distinguished by the appellant support the validity of the lower court's orders directing him to testify.

In *Moxie Nerve Food Co. v. Modox Co.*, 152 F. 493 (C. C. R. I. 1907), complainant, a manufacturer of a so-called "liquid nerve tonic", sought an injunction against infringement of its trade-mark rights, imitation of its trade name and various acts of unfair competition. Defendant contended that the complainant had been guilty of such false representations in connection with the sale of its tonic that it was not entitled to equitable relief. On final hear-

ing, it appearing that the complainant had made numerous extravagant representations with respect to the therapeutic value of its product but had offered no proof as to its ingredients, claiming that its formula was a trade secret privileged against disclosure, the court denied relief, stating:

"The proprietor of a secret preparation may justly claim protection of a trade secret, but to the extent of his representations to the public secrecy is waived; and there is no hardship in requiring a complainant who has stated certain things to the public as truths in order to promote the sale of his goods to * * * prove them as truths, in order to secure equitable relief. The right to preserve a trade secret does not carry with it a general right to have one's bare word or unsworn statement accepted in a court of equity, or excuse a failure to prove the truth of what is published to the public. To the extent that a manufacturer of goods chooses to reveal their character and composition to the public—to that extent he waives the right of secrecy in a court of equity." 152 F. at 498.

"The representation upon the label of a package is a material part of the vendor's business, and no undue hardship or inconvenience will result to an honest vendor if he is required to prove the truth of his label as he is required to prove the truth of any other material fact. This rule, I am aware, may prove exceedingly embarrassing to many vendors of patent medicines, but only to those who are guilty of misrepresentation and deceit. It need not prove embarrassing to one who wishes to keep a trade secret, for he need only forbear publishing what he does not care to prove." *Id.* at 500.¹⁵

¹⁵ See also *Worden v. California Fig Syrup Co.*, 187 U. S. 516 (1903); *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 155 F. 964 (C. C. A. 6th, 1907); *Drake v. Herrman*, 261 N. Y. 414, 185 N. E. 685, 686 (1933) ("Generally, disclosure of legitimate trade secrets will not be required

In *Coca-Cola Co. v. Joseph C. Wirthman Drug Co.*, 48 F. 2d 743 (C. C. A. 8th, 1931), plaintiff appealed from a decree dismissing a bill to enjoin the defendant from passing off diluted coca-cola syrup as genuine. Desiring to protect as a trade secret its formula for the manufacture of syrup, plaintiff did not disclose the formula but sought instead to prove the defendant's alleged wrongful conduct by evidence as to comparative chemical analyses of genuine syrup and the syrup sold by the defendant. (48 F. 2d at 744-745.) The trial court held that this evidence was not competent for the reason that the genuineness of the syrup sold by defendant was "to be determined upon the facts in evidence, not upon a comparison of one fact in evidence with another which is not in evidence." (*Id.* at 746.) This ruling was sustained on appeal, the circuit court of appeals stating:

"Obviously the case is one where the burden is upon the appellant to prove the dilution by competent evidence. Where that character of evidence is within its control it cannot avoid producing it solely because to do so would reveal its trade secret." *Id.* at 747.

In *DuBois v. Thomas*, 154 Miss. 286, 122 So. 495 (1929), complainant sued in equity to compel specific performance of a contract to build and equip a mill for the manufacture of paper by an alleged secret formula. Defendant contended that she was induced to enter into the contract by complainant's repre-

except to the extent that it appears to be indispensable for ascertainment of the truth. * * * There can, of course, be no legal sanction for the circulation of poison throughout the community, and if this product does include inherently dangerous substances, the secrecy of its manufacture ought not to be protected.").

sentations that the use of his formula made possible the manufacture of a higher grade of paper at less expense than customary processes, that these representations were false and fraudulent and the complainant's formula was wholly without value. On cross-examination complainant refused to disclose his formula on the ground that it was a trade secret. The trial court upheld this contention and entered a decree in his favor. On appeal this ruling was reversed, it being held that:

"A witness has a qualified, but not an absolute, privilege of refusing to disclose trade secrets when the disclosure thereof would depreciate their value. He should not be compelled to disclose such secrets where so to do is not essential to the ends of justice; but where a trade secret is relative to an issue being tried, and its disclosure is essential in order that the issue may be correctly determined and justice administered accordingly, a witness is not privileged to refuse to disclose it. To hold otherwise would violate the general principle 'that testimonial duty to the community is paramount to private interests, and that no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced.'" 122 So. at 495-496.

In *Willson v. Superior Court*, 66 Cal. App. 275, 225 P. 881 (1924), appellant had been sued in a personal injury action growing out of the explosion of a flare manufactured by him. During the trial of the case counsel for the injured party asked him to state the constituents of the flare. This the appellant declined to do on the ground that its composition was a trade secret. The trial court directed him to answer the question, and adjudged him guilty of contempt

when he refused to do so. From this judgment appellant appealed, contending that the trial court had no power to direct him to disclose his trade secret. It was held that the trial court's action was proper, the appellate court stating:

"While it may be of great pecuniary importance to the owner of a trade secret * * * that the formula for [his product's] production remain undisclosed, it may also well be of greater comparative consequence to one injured by or through its use that the secret be divulged in order that the rights of the injured person may be adequately protected. The right of the manufacturer to the protection of his trade secret ought to yield to the superior right of an innocent person who has suffered injury through no fault of his own * * *. It would, indeed, be a dangerous principle and one inimical to the standards of justice, to hold that the right of an injured innocent person to redress should be withheld solely because the person causing the injury and responsible therefor was in possession of certain facts, however consequential to his private interests, without the disclosure of which such right could not be determined or enforced, and thus, in effect, uphold the wrongdoer in his wrongdoing. No man is entitled to be protected in his proper right to a trade secret where, by the exercise of such right, he has wrought an injury to another and the disclosure of such secret is indispensable to the ascertainment of the truth and the ultimate determination of the civil rights of the parties." 225 P. at 883.

In *Gossman v. Rosenberg*, 237 Mass. 122, 129 N. E. 424 (1921), plaintiff brought an action in contract to recover losses sustained in a joint venture involving the purchase and sale of merchandise. On cross-examination he declined to disclose the details of certain of his operations on the ground that they were

trade secrets privileged against disclosure. The trial court's action in sustaining this contention was held erroneous, the court stating:

"Upon the issue of the full truth of the items of expenditure stated in the account, it would seem to be plain that the name of the person of whom and to whom the plaintiff bought and sold the merchandise, as also the name of the person to whom he claimed to have paid a commission, were directly relevant to the issues * * *. A fair and full cross-examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere privilege to be exercised at the sound discretion of the presiding judge * * *. The statement of the judge when refusing to admit the evidence, 'I suppose your question is a proper one,' is apparently a recognition of the generally accepted rule * * *. His refusal to admit the cross-examination was squarely based upon a supposed right or privilege of the witness to refuse to disclose trade secrets however relevant to the matter in issue. The position and claim is essentially unsound * * *." 129 N. E. at 425-426.

The authorities, it is submitted, clearly sustain the validity of the court's orders directing the appellant to reveal his formula for Bonequet Tablets. Evidence of their quantitative composition is not only relevant and material, it is essential to the proper determination, for the benefit of the public, of the truth or falsity of the statements made by appellant to induce the purchase of his drug.

It cannot be questioned that it is in the public interest to prevent the sale of commodities by the use of false and misleading representations. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 494 (1922); *Dr. W. B. Caldwell, Inc. v. Federal Trade*

Commission, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935). By Sec. 5 of the Federal Trade Commission Act, the Commission is "directed" to do so, and, to enable it to perform that duty, it is expressly authorized by Sec. 9 of the Act "to require * * * the attendance and testimony of witnesses" and to invoke the aid of the courts to compel the giving of "evidence touching the matter in question" in the case of recalcitrant witnesses. 15 U. S. C. A. Secs. 45, 49. This language, not qualified or limited by any exception, necessarily means the attendance of *any* witness and the giving of *any* testimony, including that disclosing trade secrets, relevant to the determination of every material fact in issue in Commission proceedings.¹⁶

In these circumstances, there being no express declaration by Congress to that effect, a respondent has no right to shroud in secrecy the facts by which the truth or falsity of his public representations must be assayed, for "there is no privilege of silence when reticence, if tolerated, would thwart the public good." *In re Edge Ho Holding Corp.*, 256 N. Y. 374, 176 N. E. 537, 539 (1931). If this were not the case, the harm

¹⁶ As heretofore indicated, *supra* pp. 9-12, not even the privilege against self-incrimination may be invoked. 15 U. S. C. A. Sec. 49. Under Sec. 11 of the National Labor Relations Act, 29 U. S. C. A. Sec. 161, relating to the attendance of witnesses and the taking of testimony in Labor Board proceedings, the provisions of which are essentially the same as those of Sec. 9 of the Federal Trade Commission Act, it has been held that, "The only limitation upon the power of the Board to compel the production of documentary or oral evidence is that it must relate to or touch the matter under investigation or in question." *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692, 694 (C. C. A. 10th, 1941).

which could be visited upon the public by manufacturers of worthless or dangerous nostrums and devices can scarcely be exaggerated, and the Commission would be seriously handicapped, if not rendered substantially powerless, to take effective action in the public interest. "The suppression of truth is a grievous necessity at best, more especially when * * * the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann v. Securities & Exchange Commission, supra*, 87 F. 2d at 378. Appellant's interest here is not of that character.

The fact that Congress contemplated that the Federal Trade Commission would come into the possession of trade secrets, and intended that it should, is clear from Sec. 6 (f) of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 46 (f), prohibiting the disclosure of "trade secrets and names of customers" obtained in the exercise of the *investigative* powers granted to the Commission in that section.¹⁷ Had Con-

¹⁷ Sec. 10 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 50, makes it a criminal offense for any officer or employee of the Commission to disclose, without its authority, any information obtained by it. It is likewise a violation of the Criminal Code of the United States, 18 U. S. C. A. Sec. 216, for any Federal employee "to divulge or to make known in any manner whatever not provided by law * * * the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties * * *." Preliminary to the issuance of the Commission's formal complaint against appellant, the Commission made the customary investigation which precedes the filing of such complaints and requested appellant to disclose his formula. This he declined to do. If he had complied with the Commission's request, medical experts employed by the Commission could have determined whether his representations as to the contents and therapeutic value of his tablets were true. Had they so found, there would have been no occasion for the filing of a complaint against the appellant or for a public disclosure of his formula. Its secrecy would have been fully protected,

gress also intended to protect or to prohibit the Commission from requiring the disclosure of relevant trade secrets upon the trial of formal complaints issued under Sec. 5, it would have so provided either in that section or in Sec. 9, quoted above, authorizing compulsory process to require the attendance and testimony of witnesses. No such prohibition appears, however, and the authority of the Commission to require the giving of testimony must be construed to include testimony as to trade secrets.

That Congress had the power to grant such authority cannot be doubted, for its power to regulate and protect interstate commerce, in the exercise of which the Federal Trade Commission Act was passed, is plenary and complete, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937); it resembles in character and is certainly as great as the police powers of the states, *Kentucky Whip & Collar Co. v. Illinois Central R. R.*, 299 U. S. 334, 345-347, 352 (1937); *Seven Cases v. United States*, 239 U. S. 510, 514-515 (1916), and it is well settled that in the exercise of those powers states may lawfully require the disclosure of trade secrets. *National Fertilizer Assn. v. Bradley*, 301 U. S. 178, 182 (1937); *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 431-432 (1919). As the Supreme Court said in another connection in the *Seven Cases* case, *supra*:

for the Commission would have had no cause to disclose it, and its employees would have been prohibited from doing so under both the penal provisions of Sec. 10 of the Federal Trade Commission Act and the Criminal Code.

"It cannot be said * * * that one who should put * * * a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power." 239 U. S. at 518.

IV

CONCLUSION

Appellant cannot on this appeal from an order adjudging him in contempt of and committing him for his refusal to comply with the orders directing him to reveal his formula for Bonquet Tablets collaterally attack or question the validity of those orders. The orders so directing him to testify, however, were in any event valid and proper in every respect.

The Federal Trade Commission therefore prays that this Court affirm the order from which appellant prosecutes his appeal.

Respectfully submitted.

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WASHINGTON, D. C., *February 20, 1942.*

APPENDIX

Relevant portions of the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, as amended by Act approved March 21, 1938, 52 Stat. 111; 15 U. S. C. A. Secs. 41-58)

SEC. 5 [15 U. S. C. A. Sec. 45] (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * The testimony in any such proceeding shall be reduced to writing and filed in

the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *

(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive. * * *

SEC. 9. [15 U. S. C. A. Sec. 49] That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any mem-

ber of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence..

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall

be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. [15 U. S. C. A. Sec. 50] That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. * * *

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

United States 12
Circuit Court of Appeals
For the Ninth Circuit.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate
of Simon T. Douglas, Deceased,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana.

FILED

DEC 15 1941

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate
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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

Mr. RAYMOND E. DOCKERY,
Lewistown, Montana.

Messrs. BELDEN & DE KALB,
Lewistown, Montana.
For Plaintiff and Appellee.

Mr. J. R. WINE,
Helena, Montana.

Mr. W. Q. VAN COTT,
1311 Walker Bank Bldg.,
Salt Lake City, Utah.

Mr. D. EUGENE LIVINGSTON,
Continental Bank Bldg.,
Salt Lake City, Utah.
For Defendant and Appellant. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.—Great Falls Division.

No. 1237.

E. B. CHAPMAN, as Administrator of the ES-
TATE of SIMON T. DOUGLAS, deceased,
Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON, a corporation,

Defendant.

Be It Remembered, that on July 10, 1935, a Transcript on Removal from the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, was duly filed herein, the Complaint contained in said Transcript being in the words and figures following, towit: [2]

In the District Court of the Tenth Judicial District
of the State of Montana, in and for the County
of Fergus.

E. B. CHAPMAN, as Administrator of the Estate
of Simon T. Douglas, deceased,

Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON, a corporation,

Defendant.

COMPLAINT

Comes Now the Plaintiff and for Cause of Ac-
tion Against the Defendant, Complains and Alleges:

I

That one, Simon T. Douglas died intestate in
Fergus County, Montana, on or about the 12th day
of January, 1935, being at the time of his death a
resident of said County, and leaving an estate in
said County of Fergus, being at the time of his
death, and at all times herein mentioned, the owner
of and in possession of all of the personal property
hereinafter mentioned, described and referred to;
that thereafter on the 23rd day of March, 1935, the
Plaintiff herein filed his petition in the above enti-
tled Court for Letters of Administration of the es-
tate of the said Simon T. Douglas, deceased, and
that thereafter such proceedings were had and taken

in said matter, that by an order duly made and given on the 4th day of April, 1935, the Plaintiff herein was by order of Court, duly appointed Administrator of the Estate of Simon T. Douglas, deceased, and Letters of Administration ordered issued to him upon his taking the oath and filing a bond as required by law and the order of the Court; that thereafter this Plaintiff did file a bond as required by the order appointing him administrator, which bond was approved by the Court, and did take the oath of administration as required by law, and Letters of Administration were thereupon issued to the Plaintiff herein on the 9th day of April, 1935; that the Plaintiff herein is now and has been ever since the 9th day of April, 1935, the duly [3] and regularly appointed, qualified and acting administrator of the estate of Simon T. Douglas, deceased.

II

That during his life time, to-wit on the 27th day of December, 1933, the said Simon T. Douglas, now deceased, made, executed and delivered a certain chattel mortgage, in favor of the Defendant herein to secure the payment to the Defendant of \$17,000.00, covering 505 head of sheep of various ages and sex, 12 head of work horses, 10 head of saddle horses, 290 ton of hay, wool and other incidental property, and equipment described therein, the indebtedness secured being due and payable December 15, 1934, after date, which chattel mortgage was duly and regularly filed in the office of the County

Clerk and Recorder of Fergus County, Montana, on the 8th day of January, 1934, at 4:55 o'clock P. M., of said day, and remains as a record thereof, a copy of which said chattel mortgage is hereunto attached, marked Exhibit "A", and by reference thereto, made a part hereof;

That on or about the 14th day of December, 1934, during his life time, the said Simon T. Douglas, made, executed and delivered to the Defendant herein his further certain chattel mortgage to secure the payment of \$19,270.00, covering 5675 head of sheep, of various ages and sex, 3 cows, 22 head of horses, all hay, wool and unsold 1934 wool and other incidental property and equipment described therein, the indebtedness so secured by the same being due and payable July 1, 1935, after date, which chattel mortgage was duly and regularly filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., of said day, and is still a record thereof, a copy of which said chattel mortgage is hereunto attached, marked Exhibit "B", and by reference thereto made a part hereof; the last described mortgage contained a provision as follows, to-wit:

"The indebtedness secured hereby, or part thereof, is a renewal and continuation of the indebtedness secured by the mortgage, or mortgages, in the office of the above county, or counties."

and Plaintiff is informed and believes and so alleges that both of said mortgages were given in connection with the same indebted- [4] ness and purported to cover the same proportions of the same property and its increase, which indebtedness and property increased and decreased during the existence of said mortgages, because of advances made, natural increase, sale of property and application of proceeds.

III

That immediately after the death of said Simon T. Douglas, deceased, the said mortgagee, the defendant herein, by and through its officers and agents, went to the place where Simon T. Douglas lived and where he had been keeping the mortgaged property and took possession of certain of the property covered by the said mortgage, hereinafter more particularly described, and on or about the 28th day of January, 1935, with full knowledge on the part of the Defendant and its agents and officers of the death of Simon T. Douglas, and that no administrator or executor had been appointed, or letters of administration or testamentary granted in the matter of his estate, posted notices of sale of the property covered by said mortgage, being designated as "Notice of Sale under Chattel Mortgage", a copy of which said notice is hereunto attached, marked Exhibit "C", and by reference thereto, made a part hereof, the said notice fixing the 5th day of February, 1935, as the date upon which said property was to be sold.

IV

That on the 5th day of February, 1935, at the time and place designated in said notice, the said mortgagee, by and through its officers and agents did hold a public sale of the said mortgaged property, then in mortgagee's possession, under the provisions of said mortgage, and did wrongfully sell, alienate and permanently dispose of, by delivery to various purchasers, all of the property of the deceased, then in their possession, covered by said chattel mortgage, prior to the appointment of an administrator in his estate and the granting of any letters testamentary or of administration; that said property, as aforesaid, then and there in possession of the Defendant, as mortgagee, and so wrongfully sold and alienated [5] by said mortgagee, is specifically described as follows, to-wit:

- 1453 1934 ewe lambs and a few wethers
- 1080 old ewes
- 1273 two, three, four and five year old ewes
- 21 head of horses
- 308 sacks of molasses cake
- 236 rams, bucks and old bucks
- 36 tons of hay
- 800 bushel of oats
- 90 tons of oat hay

All wagons, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay racks, stackers, loaders, and all and similar ranch or farm machinery, which were all gathered together and sold as one

item. The sale of said property being shown by that said mortgagee's return of sale, a copy of which is hereunto attached, marked Exhibit "D", and by reference thereto, made a part hereof, which return is attached to the chattel mortgage, hereunto attached, marked Exhibit "A".

V

That on the date of said sale the amount due Defendant on said mortgage indebtedness was the sum of \$16,788.92, and that the gross proceeds of said sale amounted to the sum of \$15,000.92.

VI

That at the time of taking possession of said property, so sold, by the mortgagee, and at the time of the sale thereof, there was sufficient pasture available and sufficient hay and *fee* on hand and protection available, for the proper protection and keeping of the livestock covered by said mortgage for several months, and equipment and other property was secure, and there was no necessity whatsoever for an immediate sale of said property, the reasonable market value thereof exceeding greatly the amount then due and owing, or to become due and owing to said mortgagee.

VII

That said sale was so poorly and hurriedly organized and so negligently and poorly handled, and the property so grouped and offered for sale in lots

of such size, as to preclude bids from ordinary prospective purchasers with the result that the reasonable value of said property was not received from purchasers at said sale, and said property was sold and alienated for a consideration far below the reasonable value thereof to damage [6] of the Plaintiff and the estate he represents, as hereinafter set out.

VIII

That Plaintiff is informed and believes and so alleges that the said mortgagee failed to account for all of the property sold and disposed of by it at said sale.

IX

That at the time of said sale and prior to the holding thereof the attention of the Defendant and of its officers and agents was directly called by persons interested in the estate of the Mortgagor to the fact that no letters of administration or testamentary had been issued in the estate of the deceased mortgagor, and that under the law of the State of Montana, as hereinafter set out their action in so disposing of said property was unlawful and that the Defendant would be liable to damages of double the value of the property disposed of and alienated through said sale to the estate of said mortgagor, and protest of said sale was then and there made and given to the Defendant, its agents and officers. That said Defendant and its officers and agents, with full notice and knowledge of the facts and law as

above set out, did ignore the facts and law and did knowingly, wilfully and wrongfully proceed with such sale as aforesaid and did wrongfully dispose of and alienate the property of said estate prior to the issuance of Letters of Administration or testamentary to the damage of the Plaintiff and the estate he represents as hereinafter set out.

X

That the value of the property of the deceased, so wrongfully sold and alienated before the granting of Letters testamentary or of administration, as aforesaid, at the date of said sale of said property, was as follows, to-wit:

That said 1453, 1934 ewe lambs were of
the value at the time when sold at
\$6.00 per head, or of a value of.....\$ 8718.00

That the 1080 head of old ewes were
reasonably worth \$5.00 per head, or
of a value of..... 5400.00

That the 1273 head of two, three, four
and five year old ewes, were reason-
ably worth \$7.00 per head, or of a
value of 8911.00

That said 21 head of horses were of
the reasonable value of..... 1200.00

[7]

That said 308 sacks of molasses cake
were reasonably worth the sum of
\$2.40 per sack, or of a value of..... 739.20

That said 236 head of rams, bucks and old bucks, were reasonably worth the sum of	1930.00
That said 46 tons of hay was reasonably worth the sum of \$15.00 per ton, or a value of.....	690.00
That said 800 bushel of oats were reasonably worth the sum of \$1.50 per cwt. or a value of.....	12.00
That said 90 ton of oat hay was reasonably worth the sum of \$10.00 per ton, or a total of.....	900.00
That the wagons, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay racks, stackers, loaders and other similar ranch or farm machinery, which were lumped and sold as one item, were reasonably worth the sum of.....	3000.00
Total.....	\$31500.20

XI

That in conducting the sale of said property as aforesaid, the Defendant herein did deliver possession of the property purchased to the purchasers, and that said property was thereupon or immediately thereafter removed from the premises by the said purchasers, resold by them and handled in such a manner that it is impossible for the Plaintiff to locate or recover any of said property, and that

none of said property was purchased by or retained by the Defendant mortgagee and the same and the whole thereof has been totally lost to the Plaintiff herein in the estate which he represents.

XII

That under the provisions of Section 10140 of the Revised Codes of the State of Montana, 1921, it is provided that,

“If any person before the granting of Letters testamentary or of administration embezzles or alienates any of the money, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by an executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

and Plaintiff alleges that before the granting of letters testamentary or of administration in the estate of said Simon T. Douglas, deceased, the Defendant, the Regional Agricultural Credit Corporation of Spokane, Washington, did by its action, as aforesaid, wrongfully alienate the goods, chattels, and effects of the decedent, Simon T. Douglas, as aforesaid, and hereinbefore set out, in such a way as to preclude recovery thereof by the Plaintiff, all against [8] the form of the Statute in such case made and provided; and that by reason of its action in so doing, it is liable and has become indebted to the Plaintiff herein as the Administrator of said

Estate, who brings this action for the benefit of the said estate in double the value of the property so wrongfully alienated, as aforesaid, and by reason of the above and foregoing, is indebted to the Plaintiff herein for the benefit of said estate in the sum of \$63,000.40, less any amount legitimately owed by the said decedent at the time of his death to said defendant, which said amount was fixed by the defendant its self at the time of sale, as the sum of \$16,788.92, which deducted from the value of said property, as aforesaid, leaves said defendant owing this Plaintiff for the benefit of said estate the sum of \$46,211.48, with interest thereon at legal rate from the 5th day of February, 1935.

Wherefore, Plaintiff demands judgment against the Defendant, as follows:

1st: For the benefit of the estate which the Plaintiff represents in the sum of \$46,211.48, being double the value of the property of the estate of the Plaintiff alienated by the Defendant less the amount owed the Defendant at the time of the wrongful alienation thereof.

2nd: For Plaintiff's costs in this behalf expended and incurred.

RAYMOND E. DOCKERY

Attorney for the Plaintiff

State of Montana,
County of Fergus—ss.

E. B. Chapman, being first duly sworn, deposes and says:

That he is the Plaintiff in the above entitled action; that he has read the above and foregoing Complaint and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief, and as to those matters he believes it to be true.

E. B. CHAPMAN

Subscribed and sworn to before me this 23rd day of May, 1935.

GUY M. BRISLAWN

Notary Public for the State of Montana. Residing
at Lewistown, Montana. My commission expires
April 24, 1936.

(Seal)

[Endorsed]: Filed July 10-1935. C. R. Garlow,
Clerk. [9]

That said Transcript on Removal contained a
Summons, which is in the words and figures fol-
lowing, towit: [10]

[Title of State District Court and Cause.]

SUMMONS.

The State of Montana sends greetings to the
above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this Summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said Court, this 24th day of May, 1935.

MINNIE R. RITCH,
Clerk

By F. A. CURTES,
Deputy Clerk

SHERIFF'S RETURN.

State of Montana,
County of Lewis and Clark—ss.

Office of The Sheriff.

I hereby certify, that I received the annexed summons on the 27th day of May, 1935, and personally served the same on the 28th day of May A. D. 1935, upon the defendant Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, by delivering to H. W. Dickey, Assistant Manager of the Helena Branch of said Regional Agricultural Credit Corporation of Spokane, Washington,

a corporation, personally in the County of Lewis and Clark a true and correct copy of said summons together with a copy of the complaint upon which said summons issued at the same time showing him, the annexed summons and informing him of the contents thereof.

Dated at Helena, Montana, this 28th day of May
A. D. 1935.

BRIAN D. O'CONNELL,
Sheriff.

By JOE SPURGEON,
Deputy Sheriff.

Service \$1.00

Copy

Mileage \$.34

Total \$1.34

[Endorsed]: Filed July 10-1935. C. R. Garlow,
Clerk. [11]

That said Transcript on Removal contained a Notice of Petition and Bond for Removal, which is in the words and figures following, to wit: [12]

[Title of State District Court and Cause.]

NOTICE.

To the above named Plaintiff and to Raymond E. Dockery, Esq., Attorney for Plaintiff:

Please take notice that the above named defendant, Regional Agricultural Credit Corporation of

Spokane, Washington, a corporation, will on the 14th day of June, A. D. 1935, file in the District Court of the tenth judicial district of the State of Montana in and for the County of Fergus, in which said suit is now pending, its petition and bond for the removal of said cause from said court to the District Court of the United States in and for the District of Montana, and at the same time or as soon thereafter as counsel can be heard, will request the approval of the said bond and move the court to enter an order moving the above entitled cause to said District Court of the United States in and for the District of Montana.

Dated this 8th day of June, 1935.

J. R. WINE,
Attorney for Defendant,
Helena, Montana.

Served by mail June 10-1935.

[Endorsed]: Filed July 10-1935. C. R. Garlow,
Clerk. [13]

That said Transcript on Removal contained an Affidavit of Service of Petition for Removal and Bond for Removal, which is in the words and figures following, to wit: [14]

In the District Court of the Tenth Judicial District
of the State of Montana, in and for the County
of Fergus.

E. B. CHAPMAN, as Administrator of the Estate
of Simon P. Douglas, Deceased,
Plaintiff.

vs.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON, a Corporation,
Defendant.

AFFIDAVIT OF SERVICE OF PETITION
FOR REMOVAL, AND BOND AND DE-
MURRER.

State of Montana,
County of Fergus—ss.

J. A. Robinson, being first duly sworn, deposes
and says:

That he is a white male citizen of the United
States and over the age of twenty-one years, and
resides at Helena, Lewis & Clark County, Montana.

That on the 14th day of June, 1935, at the hour
of about eleven o'clock A. M. of said day, in the
City of Lewistown, Fergus County, Montana, at the
office of Raymond E. Dockery, Attorney for Plain-
tiff herein, he did personally at that time and place
serve upon the said Raymond E. Dockery, Attorney

for Plaintiff herein, a true and correct copy of the Petition for Removal, a true and correct copy of the Bond for Removal to United States District Court, for the District of Montana, and a true and correct copy of the Demurrer filed in the above-entitled action on behalf of the defendant, by delivering to the said Raymond E. Dockery true and correct copies of the Petition for Removal, of the Bond, and of the Demurrer.

J. A. ROBINSON

Subscribed and sworn to before me this 14th day of June, A. D. 1935.

H. B. GIBSON

Notary Public for the State of Montana. Residing at Lewistown. My Commission expires June 18th, 1937.

(Notarial Seal)

[Endorsed]: Filed June 14th, A. D. 1935.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [15]

That said Transcript on Removal contained a Petition for Removal, which is in the words and figures following, to wit: [16]

[Title of State District Court and Cause.]

PETITION FOR REMOVAL.

To the Honorable District Court of the Tenth Judicial District of the State of Montana in and for the County of Fergus and to the Honorable Stewart McConochie, Judge thereof:

Now comes the above named defendant, Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, limiting its appearance herein for the purpose of filing this petition and not admitting the jurisdiction of the court over it and appearing for no other purpose whatever, files this its petition for the removal of this case and cause, and of the whole thereof, from the aforementioned District Court in which it is now pending, to the District Court of the United States in and for the District of Montana, Great Falls Division, said District and State, and your petitioner shows unto the Court;

That it is the defendant in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs the sum or value of \$3,000.00;

That the said suit is of a civil nature at common law of which the District Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this court and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of [17] the State of

Montana, or any rule of this Honorable Court, to answer or plead to the complaint of the plaintiff, elapsed;

That your petitioner, Regional Agricultural Credit Corporation of Spokane, Washington, is now, and at all times herein mentioned, has been a corporation organized and created under an Act of Congress, to-wit: the Act of January 22nd 1932 and Amendments thereto;

That the Government of the United States is now and, at all times since the organization and creation of petitioner as a corporation, has been the owner of more than one-half of the capital stock of said Regional Agricultural Credit Corporation of Spokane, Washington, petitioner herein, said Government of the United States being now and at all said times the owner of all of the capital stock of said petitioner;

That the aforementioned suit is of a civil nature at law and arises under the Constitution and laws of the United States, in that said case involves a Federal question; that is, whether or not plaintiff can establish a claim for alleged damages for an alleged conversion of personal property against your petitioner, which is now and, at all times herein mentioned, has been a corporation organized and created by Act of Congress as hereinbefore set out.

Wherefore, your petitioner prays that this Court will proceed no further herein except to make an order of removal of this action to said District Court of the United States and to accept said bond

and cause the record herein to be removed to the said District Court of the United States.

**REGIONAL AGRICULTURAL
CREDIT CORPORATION OF
SPOKANE, WASHINGTON**

By J. R. WINE

Its Attorney [18]

State of Montana,
County of Lewis and Clark—ss.

O. E. Bourck, being duly sworn, deposes and says that he is an officer of Regional Agricultural Credit Corporation of Spokane, Washington, the above named defendant and petitioner herein, to-wit: its Assistant Secretary; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The reason this verification is made by deponent and not by defendant is because defendant is a corporation, of which deponent is an officer, to-wit the Assistant Secretary thereof.

O. E. BOURCK

Subscribed and sworn to before me this 12th day of June, 1935.

(Seal)

A. E. REDINGTON

Notary Public for the State of Montana, residing at Helena, Montana. My commission expires October 18, 1935.

Service of the foregoing Petition, and the bond therein referred to, made and admitted and receipt of a true copy of each thereof acknowledged this day of June, 1935.

Attorney for Plaintiff.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [19]

That said Transcript on Removal contained a Bond on Removal, which is in the words and figures following, to wit: [20]

[Title of State District Court and Cause.]

BOND ON REMOVAL.

Know All Men by These Presents:

That Regional Agricultural Credit Corporation of Spokane, Washington, a corporation organized and existing under and by virtue of the laws of the United States of America, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and qualified to do business, and doing business, in the State of Montana, and having authority to transact business therein, as surety, are held and firmly bound unto E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, plaintiff in the above

entitled cause, his heirs, successors and assigns, in the penal sum of Five Hundred Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made the undersigned obligors bind themselves, their successors and assigns jointly and severally, firmly by these presents.

The conditions of this obligation are such that whereas the said defendant, Regional Agricultural Credit Corporation of Spokane, Washington, has applied to the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, for the removal of a certain case therein pending, wherein the said E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, is plaintiff and said Regional Agricultural Credit Corporation of Spokane, Washington, is defendant, to the District Court [21] of the United States for the District of Montana, Great Falls Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in this action in the said Court be stayed;

Now, if said Regional Agricultural Credit Corporation of Spokane, Washington, shall within thirty days from the day of filing of said petition for removal enter in the said District Court of the United States a certified copy of the record in said cause and shall well and truly pay all the costs that may be awarded by said District Court of the United

States, in and for the District of Montana, if said Court shall hold that said cause was wrongfully or improperly removed thereto, then the obligation shall be void; otherwise to remain in full force and effect.

In witness whereof said above named corporations have caused their respective corporate names to be hereunto subscribed by their respective officers and caused their respective corporate seals to be hereunto affixed this 12th day of June, 1935.

REGIONAL AGRICULTURAL
CREDIT CORPORATION OF
SPOKANE, WASHINGTON

By O. E. BOURCK

Assistant Secretary

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By L. K. ALBRECHT,

Attorney in Fact.

(Seal)

Approved and accepted this 15th day of June,
1935.

STEWART McCONOCHIE
Judge

[Endorsed]: Filed July 10, 1935. C. R. Garlow,
Clerk. [22]

in form and substance and that the surety thereon is likewise sufficient; and the Court being fully advised in the premises;

It is Therefore Ordered that the above entitled cause be, and the same is, hereby removed to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to the Statutes of the United States, and that all other proceedings of this Court be stayed.

Dated this 15th day of June, 1935.

STEWART McCONOCHIE,
Judge.

[Endorsed]: Filed July 10, 1935, C. R. Garlow,
Clerk. [27]

That said Transcript on Removal contained Clerk's Certificate to Transcript on Removal, which is in the words and figures as follows, towit: [28]

[Title of State District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT.

State of Montana,
County of Fergus—ss.

I, Minnie R. Ritch, Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, Do Hereby Certify, That the foregoing transcript, consisting of 37 pages, contains and sets forth full, true, correct

and compared copies of all papers on file in my office in an action in the District Court entitled: "E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, Plaintiff, vs. Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, Defendant", which is designated in the records of my office as Cause No. 16947.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, at Lewistown, Montana, this 8th day of July, 1935.

(Seal) MINNIE R. RITCH,

Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus. [29]

I, Stewart McConochie, Judge of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, do hereby certify that Minnie R. Ritch was, at the date of the foregoing certificate, and now is, Clerk of said Tenth Judicial District, in and for the County of Fergus, State of Montana, and that said Clerk is the officer in whose custody the files of the above-entitled action are required to be kept by the laws of the State of Montana, and authorized by the laws of the State of Montana to certify as aforesaid, and that

said attestation to said copies of said papers is in due form of law.

Dated at Lewistown, Montana, this 8th day of July, 1935.

STEWART McCONOCHIE,

Judge of the Tenth Judicial District Court of the State of Montana, in and for the County of Fergus.

I, Minnie R. Ritch, Clerk of the Tenth Judicial District Court of the State of Montana, in and for the County of Fergus, Do Hereby Certify, that Stewart McConochie was, at the date of the foregoing certificate, the duly appointed, qualified and acting Judge of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Lewistown, Montana, this 8th day of July, 1935.

(Seal)

MINNIE R. RITCH,

Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [30]

Thereafter, on August 8, 1935, an Amended Demurrer was duly filed herein, being in the words and figures following, towit: [31]

In the District Court of the United States,
in and for the District of Montana.
Great Falls Division.

E. B. CHAPMAN, as Administrator of the Estate
of Simon T. Douglas, deceased,
Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON, a corporation,
Defendant.

AMENDED DEMURRER.

Comes now the above named defendant and within thirty (30) days after filing the transcript on removal in the above entitled action in the office of the Clerk of the above entitled Court, files this, its amended demurrer to the complaint of the plaintiff herein upon the grounds and for the reasons following, towit:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is ambiguous, unintelligible and uncertain in the following particulars, towit:

(a) That it is alleged in Paragraph VII of said complaint "That said sale was so poorly and hurriedly organized, and so negligently and poorly handled, and the property so grouped and offered for sale in lots of such size" as to preclude bids from ordinary prospective purchasers, and defendant is not informed by such allegation, nor can it understand, or intelligently answer such allegation, in that no fact or facts is or are alleged, but the conclusions ONLY of the plaintiff are stated.

(b) That it is alleged in Paragraph VIII of said complaint that the mortgagee (this defendant) "Failed to account for all of the property sold and disposed of by it at said sale"; that defendant cannot understand nor is it advised by such allegation what items of personal property it failed to account for from such mortgage foreclosure sale.

(c) That it is alleged in said complaint that the deceased, Simon T. Douglas, made, executed and delivered certain chattel mortgages on personal property owned by him during his lifetime to [32] secure the payment of a certain indebtedness owing by him to the defendant; that thereafter the defendant pursuant to the power of sale contained in said respective chattel mortgages posted notices of sale for the length of time required by law and sold said property to satisfy said mortgages pursuant to the Statutes of the State of Montana and the terms of said respective chattel mortgages; that such sale is the only sale mentioned or referred to in said complaint and from the allegations of

said complaint and the Exhibits attached thereto it appears that said sale was fair and regular on the face thereof; that notwithstanding such fair and regular sale pursuant to law and said respective chattel mortgages it is alleged in Paragraph IX of said complaint that the defendant "did wrongfully dispose of and alienate the property of said estate prior to the issuance of letters of administration or testamentary to the damage of the plaintiff and the estate he represents"; and in Paragraph XI of said complaint it is alleged that the purchasers at such mortgage foreclosure sale removed said personal property and resold it so that it was impossible for the plaintiff to locate or recover any of said property; and in Paragraph XII plaintiff set out a copy of Section 10140 Revised Codes of Montana, 1921, and follows the same by various conclusions of the plaintiff to the effect that the defendant wrongfully alienated the goods, chattels and effects of decedent, Simon T. Douglas, and that by reason of such mortgage foreclosure sale defendant is liable and has become indebted to the plaintiff administrator in double the value of the property so disposed of.

That such allegations are inconsistent and that the one destroys the other in this, to wit: That if such sale were made pursuant to law and the terms of such chattel mortgages no facts are alleged on which the plaintiff may properly, or at all, predicate the conclusion that the defendant wrongfully,

or otherwise, alienated the property of said decedent, Simon T. Douglas, but on the contrary it affirmatively appears from said complaint that said defendant proceeded according to law and the terms of said chattel mortgages, and it did not violate or transgress any legal right of the said plaintiff or said plaintiff's intestate.

J. R. WINE,

Attorney for Defendant.

[Endorsed]: Filed August 8, 1935. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [33]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Montana,

County of Lewis and Clark—ss.

J. R. Wine, being first duly sworn, deposes and says:

That he is an attorney at law and is the attorney of record for the above named defendant in the above entitled action, and that he resides and maintains his office in the City of Helena, in the County of Lewis and Clark, State of Montana; that Raymond E. Dockery is the attorney of record for the above named plaintiff in said cause and resides and has his office at Lewistown, in the County of Fergus, in said State of Montana; that in each of said two

places there is a United States post office and between said two places there is a regular daily communication by mail; that on the sixth day of August, A. D. 1935, deponent served a true copy of defendant's Amended Demurrer in the above entitled action herein on said Raymond E. Dockery, the said attorney for said plaintiff, by depositing a copy of said Amended Demurrer on said August 6th, 1935 in the post office at said City of Helena, County of Lewis and Clark, State of Montana, aforesaid, properly enclosed in a franked envelope, not requiring postage, and addressed to Raymond E. Dockery, Attorney at Law, Lewistown, Montana, the place of his said residence and office.

J. R. WINE

Subscribed and sworn to before me this 6th day of August, 1935.

(Seal) MYLES J. THOMAS,

Notary Public for the State of Montana. Residing
at Helena, Montana. My commission expires
Oct. 16, 1937. [34]

(Order indorsed on back cover of Amended
Demurrer)

The within demurrer came on regularly for hearing under Rule 40 (2) of the rules of this Court, and, having been duly considered, and the court being advised, and good cause appearing therefor, the said demurrer is hereby sustained as to both

paragraphs thereof; with leave to amend within ten days from receipt of notice hereof.

CHARLES N. PRAY,
Judge.

Nov. 18, 1935. [35]

Thereafter, on September 27, 1935, a Brief was filed by plaintiff herein, on the Amended Demurrer, which Brief is in the words and figures following, towit: [36]

[Title of District Court and Cause.]

BRIEF

The complaint in this case is predicated upon the provisions of Section 10140, Revised Codes of Montana for the year 1921, reading as follows:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

The same code provision obtains in other states in full substance at least. In Oklahoma, the section seems to be identical as it appears in Section 1220,

Compiled Statutes of Oklahoma, 1921, as quoted in
Secrest v. Wood, 224 Pac. 349;

The Oklahoma court in

Litz v. Exchange Bank of Alva, 15 Okla. 564,
83 Pac. 790,

applying the statute, clearly indicates in the opinion
that the complaint herein states a cause of action.

[37]

Likewise, the court in

Aultman and Taylor Machinery Company v.
Fuss, 207 Pac. 308

further exemplifies the statute.

This is not a case where mere possession was taken under the chattel mortgage and the possession retained until an administrator or executor had been appointed and a sale thereafter held. Here, the complaint discloses that there was no administrator appointed and the property was seized and sold under such circumstances that the estate was seriously damaged.

We shall, in this opening brief, further justify the filing of the action. An extensive amended demurrer has been filed which needs argument at the hands of learned counsel for defendant. We shall endeavor to answer those arguments in a reply brief as soon as an answering brief has been served upon counsel for plaintiff.

We respectfully submit that the complaint states a cause of action and that defendant should be compelled to answer.

Respectfully submitted,

RAYMOND E. DOCKERY

BELDEN & DeKALB

Attorneys for Plaintiff

[Endorsed]: Filed Sept. 27, 1935. C. R. Garlow,
Clerk. [38]

Thereafter, on October 5, 1935, Defendant's Brief on Demurrer was duly filed herein, being in the words and figures following, towit: [39]

[Title of District Court and Cause.]

DEFENDANT'S BRIEF ON DEMURRER

1.

Statement of the Case

Briefly, the following facts are to be gathered from the Complaint:

Simon T. Douglas died intestate January 12th 1935, leaving an estate in Fergus County, Montana; that after a lapse of more than two months and on the 4th day of April, 1935, plaintiff was appointed administrator, and letters were thereafter issued to him on the 9th day of April, 1935;

That the said Simon T. Douglas on December 27th 1933, duly executed a mortgage to the defendant in the amount of Seventeen Thousand (\$17,000.00) Dollars, covering certain personal property, which mortgage was duly and regularly filed in

Fergus County on the 8th day of January, 1934, a copy of which mortgage is attached to the Complaint, and thereafter and on the 14th day of December, 1934, said Douglas executed an additional mortgage in favor of the defendant in the principal sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars, covering certain personal property, therein described, and said mortgage was filed in Fergus County on the 28th day of December, 1934, and a copy of said mortgage is attached to the complaint;

It Is Further Alleged: That after the death of Douglas, the defendant went to his place and took possession of certain property covered by the said mortgage, and on the 28th day of January, 1935, and with full knowledge of the death of Douglas, and [40] that no administrator had been appointed, posted Notices of Sale of the property covered by the mortgage, a copy of which Notice is attached to the Complaint as Exhibit "C", and thereafter and on the 5th day of February, 1935, at the time and place designated in said Notice, defendant held "a public sale of the said mortgaged property, then in mortgagee's possession, under the provisions of said mortgage, and did wrongfully sell, alienate and permanently dispose of, by delivery to various purchasers, all of the property of the deceased, then in their possession, covered by said chattel mortgage, prior to the appointment of an administrator in his (decedent's) estate, and the granting of any letters testamentary or of administration", and

then follows a specific description of the property sold;

It Is Further Alleged; That the sale of said property is shown by said mortgagee's Return of Sale, "a copy of which is hereunto attached, marked Exhibit "D", and by reference thereto made a part hereof, which Return is attached to the chattel mortgage, hereunto attached, marked Exhibit 'A' ".

It Is Further Alleged: That on the date of said sale, the amount due to the defendant on its mortgage indebtedness by the decedent amounted to the sum of Sixteen Thousand Seven Hundred Eighty-eight and 92/100 (\$16,788.92) Dollars, and the gross proceeds of the mortgage sale amounted to the sum of Fifteen Thousand and 92/100 (\$15,000.92) Dollars;

It Is Further Alleged: That at the time of taking possession of the property, there was sufficient pasture available, and hay and feed for several months, and that the property was secure, and that there was no necessity for an immediate sale, and that the reasonable market value of said property greatly exceeded the amount due and owing defendant.

It Is Further Alleged: (Paragraph VII) "That said sale was so poorly and hurriedly organized and so negligently and poorly handled, and the property so grouped and offered for sale in lots [41] of such size, as to preclude bids from ordinary prospective purchasers with the result that the reasonable value of said property was not received from purchasers at said sale, and said property was sold and alien-

ated for a consideration far below the reasonable value thereof to damage of the plaintiff and the estate he represents, as hereinafter set out”.

It Is Further Alleged: (Paragraph VIII) “That plaintiff is informed and believes and so alleges that the said mortgagee failed to account for all of the property sold and disposed of by it at said sale”.

It Is Further Alleged: That persons interested in the estate of the mortgagor (without naming them or setting forth what their interest is) directed the attention of the defendant and its agents to the fact that no administrator had been appointed, and that a mortgage sale of said property was unlawful, and that defendant would be liable to damages, but that the defendant and its agents, with full notice and knowledge of the facts and law, ignored the same, and “did knowingly, wilfully and wrongfully proceed with said sale as aforesaid, and did wrongfully dispose of and alienate the property of said estate prior to the issuance of Letters of Administration or Testamentary to the damage of the plaintiff and the estate he represents as hereinafter set out”.

It Is Further Alleged: That the value of the property so sold is Thirty-one Thousand Five Hundred and 20/100 (\$31,500.20) Dollars, and that in conducting said sale the defendant delivered possession thereof to various purchasers, and said property was removed from the premises by them and re-sold, and that it is impossible for the plaintiff to locate or recover any of said property, and that none of

said property was purchased or retained by the defendant;

Plaintiff then sets out a copy of Section 10140 of the Revised Codes of Montana, 1921, and again alleges that before the granting of Letters of Administration, the defendant "did wrongfully alienate [42] the goods, chattels and effects of the decedent Douglas against" the form of statute in such case made and provided, and has become liable and indebted to the plaintiff as administrator in double the value of the property so sold in the sum of Sixty-three Thousand and 40/100 (\$63,000.40) Dollars, less the amount owing to the defendant, to-wit: Sixteen Thousand Seven Hundred Eighty-eight and 92/100 (\$16,788.92) Dollars, which "leaves said defendant owing this plaintiff for the benefit of said estate the sum of Forty-six Thousand Two Hundred Eleven and 48/100 (\$46,211.48) Dollars, with interest thereon at legal rate from the 5th day of February, 1935", and the Complaint concludes with a prayer for damages in such amount and for plaintiff's costs.

It appears from the copy of the mortgage, Exhibit "A", that the indebtedness therein mentioned matured on December 15th 1934, and prior to the death of the said Douglas, and it further appears from Exhibit "C", the Notice of Sale, that the foreclosure proceedings were under the prior or older chattel mortgage, and that the sale was held because default had occurred in the conditions of the chattel mortgage executed by Douglas, "by reason of the

failure of said mortgagor to pay the debt secured thereby”.

It further appears from Exhibit “D”, which is the Return of Sale, that the sale was conducted in all particulars in accordance with the statute relating to chattel mortgage sales, under power of sale contained therein.

In short, the case attempted to be presented is this: That during his life-time, the mortgagor executed a chattel mortgage to the defendant; that he defaulted in the payment of same prior to his death; that after his death and before the appointment of an administrator (a period of almost three months), the mortgagee pursuant to the contract of the mortgagor and the power of sale contained in the chattel mortgage, sold the security in accordance with the laws of Montana, and the subsequently appointed administrator now seeks to recover double damages under section 10140, R. C. M. 1921, [43] which provides that any person who, “before the granting of Letters of Administration embezzles or alienates any of the monies, goods, chattels or effects of a decedent” is charged therewith and liable to an action by the administrator of the estate for double the value of the property so embezzled or alienated. In support of said action, the plaintiff relies solely and exclusively upon the law of the State of Oklahoma. The case at bar is attempted to be based upon facts, all of which transpired in the State of Montana. The action is pending in a Court

in the District of Montana and it is respectfully submitted, governed by the laws of Montana.

To the Complaint of the plaintiff, the defendant filed an Amended Demurrer, both general and special. This Brief is submitted in support of such Amended Demurrer.

Defendant will present to the Court the following propositions:

1.

Section 10140, R.C.M. 1921, does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages.

2.

That the provisions of said Section 10140 do not apply to a case where the defendant acted in good faith under color of legal right, supposing he had a right to enforce a lien thereon, but that to subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler and acted from wrong motives, or in bad faith.

3.

That by the great weight of authority, a power of sale vested in a mortgagee in a chattel mortgage is a power coupled with an interest which may be exercised by the donee of the power at any time, even after the death of the donor of the power. [44]

That as early as 1888, the Supreme Court of Montana announced the rule that a mortgagee has a lien upon the property mortgaged as security for his

debt, and that this lien will support a power of sale and so couple it with an interest, that it becomes a part of the security and irrevocable; again, in 1903, said court reiterated the rule that a power of sale, included in a mortgage, is a power coupled with an interest, and is a part of the security and irrevocable, and may be executed after the death of the mortgagor "without reference to the administration of the mortgagor's estate," and that such rule has been the law in Montana continuously since 1903, and is the law applicable to the case at bar.

ARGUMENT.

1.

Section 10140, R.C.M., 1921, does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages:

"The statute does not give a new right of action, nor does it create a remedy which did not previously exist; it merely increases the measure of damages in case the tortious conversion has been committed at a particular time when the property was peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuance of Letters of Administration",

2 Bancroft's Probate Practice, Sec. 485.

Levy v. Court, 105 Cal. 600, 29 L.R.A. 811.

Jahns v. Nolting, 29 Cal. 507.

Beckman v. McKay, 14 Cal. 250.

2.

The provisions of said Section 10140 do not apply to a case where the defendant acted in good faith, under color of legal right, in the enforcement of a lien on the property involved; in order to subject the defendant to the penalty given by the statute, it should appear that he was an intermeddler and acted from wrong motives or in bad faith. [45]

“To embezzle, as the term is employed in section 116, is to fraudulently appropriate to one’s own use, or conceal the effects of the estate which such person has in his possession; and to alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator, without the aid of section 116, against any person who has embezzled or alienated the personal property of the estate, prior to the grant of administration; and that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss— that is, the time intermediate the death of the de-

ceased and the issuing of the letters of administration.”

Jahns v. Nolting, 29 Cal. 508

207 Pac. Rep. 309.

This rule has even been adopted in Oklahoma—*Aultman Company versus Fuss*, 207 Pacific 308.

The same rule is laid down by the Supreme Court of Oregon, in this language:

“But, however this may be, we are of the opinion that section 1152 does not apply to a case where the defendant acted in good faith under color of legal right, supposing he had title to the property or a right to enforce a lien thereon, though he should subsequently be unable to establish such title or right. The statute is highly penal in its consequences, and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages; and its language should, we think, be so construed. To subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. *Roys v. Roys*, 13 Vt. 543; *Batchfelder v. Tenney*, 27 Vt. 578. It is not alleged, nor does it appear, that the defendants did not act in

the utmost good faith in attempting to foreclose their mortgage. They may have been ill advised, or may have mistaken their rights; but, until it is made to appear that they acted from wrongful motives or in bad faith, the plaintiff is not entitled to recover double damages from them."

Springer v. Jenkins, 84 Pac. 479 [46]

In Vermont, where the law is quite similar to our section 10140, in *Roys, Adm'r v. Roys*, 13 Vt. 543, the Court in discussing its effect said that it "should not be applied to a case" where one "acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise. To subject the defendant to the penalty he must have acted from a wrong motive and mala fide."

In a still later case, in the same state, *Batchelder, Adm'r v. Tenney*, 27 Vt. 578, involving the same statute, it was also remarked that:

"We think to bring a case within this section of the statute, the act complained of must, at least, be done with the intent of wrongfully abstracting the property from the estate of the deceased, to the injury of its assets".

The Supreme Court of Wyoming, in a well-considered case, speaking of the double penalty statute of its state, similar to our Sec. 10140, says:

"We think it may fairly be deduced from the preponderance of authority that, in order

to be subjected to the liability imposed by Section 6830, *Supra*, the person who 'alienates' property of an estate must wrongfully transfer the same, acting in that respect from a wrongful motive and *mala fide*'".

Delfelder v. Poston, 293 Pac. 354-361.

Thus it will be seen that unless the plaintiff can show that the defendant was acting in bad faith or from wrongful motives, the provisions of Section 10140, above mentioned, do not apply. The plaintiff in the instant case has shown that the defendant, in the manner provided by law and pursuant to the power of sale, contained in its chattel mortgage, was proceeding in the ordinary manner to realize on the security given in support of an obligation that was past due. The defendant's actions were open and above board, public notice was given of the sale as required by statute, and a public sale was conducted and a return of said sale was made and filed according to law. Under these conditions it is respectfully [47] submitted that any claim or contention of wrongful conduct or bad faith is entirely eliminated, and under the circumstances appearing from the Complaint, it is utterly impossible to bring the defendant within the double penalty feature of Section 10140.

3.

A mortgagee's power of sale is coupled with an interest and it is not revoked by the death of the

mortgagor. This rule of law is sustained by the overwhelming weight of authority in the United States, inclusive of the State of Montana. In support of this contention, we respectfully direct the Court's attention to the Note appearing in Volume 56, A. L. R., at Page 224, and to the cases referred to in such Note. Attention is also directed to the Note appearing in Volume 64, A. L. R., at page 380. The first paragraph of this Note reads as follows:

“Ordinarily, a principal may revoke the power of his agent or attorney at any time, but a well-defined exception has been ingrafted on this general rule, to the effect that where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the power, or not”.

This Note is supported with a large number of cases, in a large number of states, including:

Muth v. Goddard, 28 Mont. 237; 98 Am. St. Rep. 553.

First Natl. Bank v. Bell Min. Co., 8 Mont. 32.

See the case of Vaca v. Shavez (New Mexico), 252 Pac. 987.

The rule is stated in 3 Jones on Mortgages (Seventh Edition) as follows:

“Death of mortgagor.—As a general rule the death of the mortgagor does not revoke a power of sale, even though the mortgage is held merely to give a lien on the property. This being coupled with an interest in the estate, can not be revoked or suspended by the mortgagor. Of course, after his death the power can not be exercised in his name, but the authority to execute it in the name of the grantee continues. The execution of the [48] power is the grantee’s act by virtue of the power. It is not a mere power of attorney”.

(Sec. 1792)

In Volume 2 of Jones Chattel Mortgages and Conditional Sales (Bowers Edition), the rule is stated thus:

“The death of the mortgagor does not deprive the mortgagee of his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute. He is not required to file his claim in the administration proceedings, but he may proceed to foreclose by notice and sale, just as he might have done had the mortgagor survived.”

(Sec. 788)

The article in Corpus Juris, entitled, “Chattel Mortgages”, sets forth the rule as follows:

“Duration of power. A power to sell contained in a mortgage is a power coupled with an interest and is irrevocable by the mortgagor, and neither he nor an equitable owner whom he represents may defeat the right of the mortgagees to foreclose by a sale under such power. The power to sell on default does not terminate with the expiration of the period of time for which the mortgage was given, and according to some authorities continues even after the death of the mortgagor.”

(11 C. J. 704, Sec. 502)

4.

In the case of *First National Bank versus Bell Company*, 8 Mont. 32, and rendered in the year 1888, it was held that a mortgagee has such an interest in the security mortgaged as will support a power of sale in the mortgage, and that such a power coupled with said interest becomes a part of the security and is irrevocable.

Again, in the year 1903, in the case of *Muth v. Goddard*, 28 Mont. 237, the Court adhered to the ruling announced in the *First National Bank v. Bell* case, *Supra*, and quoted, with approval, from *Jones on Mortgages*, the following:

“‘This being (a power) coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the

name of the grantee continues.' And see cases cited: *Whitmore v. San Francisco Savings Union*, 50 Cal. 146; *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128." [49]

The opinion further says:

"From the foregoing authorities, it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest."

In disposing of the proposition that the exercise of a power of sale, after the mortgagor's death, was inconsistent with the provisions of the probate law, the Court concludes its opinion with the following very pertinent language:

"It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be maintained. 'The law may suspend its own process. As it gives the process, it may regulate it. But the deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.' (*Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.) The Texas cases cited by plaintiffs are not in point. See *in re Horsfall's estate*, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his

successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected."

REGARDING PLAINTIFF'S BRIEF

Defendant desires to point out that the sole and only case relied upon by plaintiff, viz: *Litz v. Exchange Bank*, 83 Pac. 790, is of no help or value as an authority in passing on the Amended Demurrer. This is true: (1) because of the difference in the statutes in Oklahoma and Montana, dealing with the foreclosure of chattel mortgages, and (2) because the defendant herein was acting under a power of sale, irrevocable in the event of mortgagor's death, and no question as to an irrevocable power was presented or determined in the *Litz* case, *supra*.

Section 8257, R. C. M., 1921, provides as follows:

"A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security."

[50]

It is held that this applies to chattel mortgages. *Kinsman v. Stanhope*, 50 Mont. at page 48, Secs. 8286-87-88 Id., provide the procedure to be followed under a power of sale. If the mortgagor does not insert a power of sale in the chattel mortgage, an

action for foreclosure is the only remedy available to the mortgagor in Montana.

This is not the case in Oklahoma. The Oklahoma law in force in 1905, and prior thereto, provides as follows:

Sec. 3572. "A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the article on pledge, or by proceedings under civil procedure;" etc.

Sec. 3573. "A chattel mortgage, when the conditions of the same have been broken, may be foreclosed by a sale of the property mortgaged, upon the notice, and in the manner following:

The notice shall contain:

1. The names of the mortgagor and mortgagee, and the assignor, if any;
2. The date of the mortgage;
3. The nature of the default and the amount claimed to be due thereon at the date of the notice.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage;
5. The time and place of sale;
6. The name of the party, agent or attorney, foreclosing such mortgage.

The notices must be posted in five places for ten days, and the mortgagee may become the purchaser.

Thus it will be seen that a mortgagee in Oklahoma has the option of proceeding in one of two ways to foreclose, without regard to any power of sale, contained in his mortgage. An examination of the Litz case (page 791—Col. 1) will disclose that the foreclosure in that case was not under a power of sale, but on the contrary was “by advertisements”. The Douglas sale, here in question, was pursuant to a “power”, and as hereinbefore pointed out, such power was not revoked by his death.

(Muth v. Goddard, *Supra.*)

In the Oklahoma case the foreclosure was conducted in the manner prescribed by statute, and the rights and liabilities of the [51] mortgagee depended exclusively upon the statute. Herein, an express power of sale, without any limitation was conferred upon the defendant; this power being coupled with an interest was not, and could not be revoked by death, insanity or bankruptcy, or as stated in the Muth case *Supra*, the Mortgagee “could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor’s estate, if he (it) so elected”. This language seems so pertinent and applicable, that nothing more remains to be said. Regardless of what the law in Oklahoma is, the Muth case settled it in Montana about thirty years ago, and so far as the writer hereof has been able to

ascertain, the rule in the Muth case has never been modified or reversed in any subsequent case in the Supreme Court of Montana.

The special Demurrer is well founded. It attacks conclusions of law and inconsistent allegations of the complaint.

After alleging the action taken by defendant in foreclosing its chattel mortgage, the addition of such words as “knowingly” or “wilfully”, or “wrongfully” most certainly does not bolster up a pleading.

It would be impossible to prepare an intelligent answer to the portions of the pleading complained of.

Respectfully submitted,

J. R. WINE,

Attorney for Defendant.

[Endorsed]: Filed Oct. 5, 1935. C. R. Garlow,
Clerk. [52]

Thereafter, on October 17, 1935, Plaintiff's Reply Brief on Demurrer, was duly filed herein, being in the words and figures following, towit: [53]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF
ON DEMURRER

Learned counsel for defendant, as we read and interpret his brief, bases his argument upon the following propositions:

I.

That since the power of sale provision of the chattel mortgage constitutes a power coupled with an interest, and under well-known rules such power is not revocable by death, that the defendant was authorized to proceed, notwithstanding the death of Douglas, to an exercise of the provisions of the power of sale.

II.

That decisions from other courts are not of value in as much as the Montana court has affirmed the validity of that contention. We think we can easily and clearly demonstrate to the court that these suggestions have no effect upon plaintiff's right. First then, let us consider the intent of the statute. It is beside the point to argue the question first as to whether it was a power of sale coupled with an interest and second, its general effect. We are not dealing with that question now. We are dealing with a prescribed period; during which time no one has the right to exercise any power such as is assumed to be granted by the provisions of the mortgage in the case at bar. The Oklahoma decisions were cited to the court because of a marked identity

of her statutory provision as found in [54] Section 10140. Oklahoma recognizes that such a provision is a power coupled with an interest, but has confined the exercise of that power to cases where an administrator or executor has been appointed.

Western Newspaper Union vs. Thurmond,
111 Pac. 204;

The statute is directed to the act of "any person, before the granting of letters testamentary or of administration." Obviously, such a statute is designed to prevent the squandering of assets when there is no person in authority to protect.

The complaint shows, perhaps with more minute detail that it needs to show, the facts which render this sale under the circumstances particularly pernicious. If the doctrine announced in 2 Bancroft's Probate Practice, quoted on page 6 of the brief of opposing counsel is the doctrine which applies, then the allegations of the complaint clearly bring the plaintiff within the elements of that doctrine and make a valid *prima facie* cause of action. We need not now commit ourselves as to whether that is the applicable doctrine.

With these differentiations, we now proceed to a specific discussion of the facts:

First, learned counsel assumes that Oklahoma has a different doctrine than Montana and most of the other States with regard to the revocation of powers coupled with an interest by death. There is no differentiation to be made in this case. Oklahoma has come squarely under the doctrine that a power

coupled with an interest is irrevocable where there is an interest in the subject matter of the power the same as in other States. See

Kimmell vs. Power, 19 Okla. 339, 91 Pac. 687.

Schilling vs. Moore, 34 Okla. 155, 125 Pac. 487.

Flitsch vs. Bishop, 118 Okla. 272, 247 Pac. 1110. [55]

Second: In order to lay a foundation for an understanding of the statute which we are discussing, let us gather up the various state statutes on this subject.

In Ross on Probate, Volume I, Page 447, the Arizona Statute has been used as an index in the following manner.

“The Arizona Statute Provides: “If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.” Ariz. Rev. St. 1721.”

“The Idaho, Montana, Oklahoma, South Dakota, Washington and Wyoming Statutes are the same as the Arizona, except that instead of the words “is chargeable therewith, and”

the Washington statute reads: "shall stand chargeable and be."

California at the present time does not now have this statute, but their statute was identical prior to 1907. See 11 Cal. Jur. 1103, Section 720.

Prior to the change of the statute in California, the Supreme Court of California had occasion to give construction to the statute, in *Jahns vs. Nolt-ing*, 29 Cal. 508; there the administrator charged in his Complaint that the Defendant "took, carried away, embezzled, alienated and has converted to his own use certain goods, chattels and effects, which were of the estate of the deceased."

In that case the widow of the deceased, intermediate to death and issuance of letters of administration, by gift, attempted to transfer title to certain personal property. The controversy in the Supreme Court was over the findings of the Lower Court, "that the Defendant did not embezzle or alienate and convert to his own use, contrary to the statute all or any of the goods or other property, which were of said Herman Schroeder, deceased in his lifetime, as in the Complaint of the Plaintiff set forth"

This was reversed by the Supreme Court, holding that the claim of good faith interposed was of no avail. We have searched diligently for construction of these statutes in harmony with the [56] contention of the Defendant here and failed to find any applicable decisions. The Supreme Court of Okla-

homa has given the statute exactly the interpretation indicated by its language. The most recent expression of that Court on the subject is at late as March 12th, 1935, in the case of *Sauls vs. Whitman* 42 Pac (2d) 275. There certain checks were delivered to the Defendant to be used after the death of the decedent, and they were so used. Good faith was asserted as a defense.

Relying upon the California decision of *Jahns vs. Nolting*, 29 Cal. 507, the Court said:

“No embezzlement being charged, this is an action involving alienation. This Court in *Aultman & Taylor Machinery Co. vs. Fuss*, 86 Okl. 168, 207 P. 308, 309, and in *Nichols & Shepard Co. vs. Dunnington*, 118 Okl. 231, 247 P. 353, in defining what is meant by the word “alienation,” adopted the definition of the Supreme Court of California as expressed in *Jahns vs. Nolting*, 29 Cal. 507, as follows, “To alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law,” which definition of itself thereby signifies that the word “wrongful” means wrongful on account of its being in violation of the statute and in violation of the common law, rather than as signifying a wrongful state of mind. In other words, whether such an alienation is “wrongful” depends not so much on the state of mind as upon the acts done.”

Again, in the same case, the Court said:

“In the early case of *Litz, Adm. vs. Exchange Bank of Alva*, 15 Okl. 384, 83 P. 790 It being admitted that the mortgagee acted in good faith, the trial court found the issues in favor of the defendant. This Court reversing the judgment, said: “But this fact would not warrant the mortgagee in advertising and selling the property before a special or general administrator was appointed.”

Again, in the same case, the Court said:

“In *Nichols & Shepard C. vs. Dunnington*, *supra*, it was stated that the term “alienate,” as used in said section, signifies the wrongful transfer of such property to another. A Judgment for the plaintiff in that case was reversed by this court, not on the ground of absence of bad faith, but because there was no transfer of the property. The mortgagee of personal property of a deceased person foreclosed against it just as in *Litz vs. Exchange Bank of Alva*, *supra*, but, instead of selling the property to a third party, as in the *Litz Case*, bid the property in itself and applied it on the mortgage debt. That is the distinction between the cases.

[57]

The *Nichols Case* is not based on an absence of wrongful alienation, but on the fact that there was no alienation at all.”

The Court in the last above cited case clearly establishes the fact that no wrongful intention is required, other than the intention to do the thing which the law forbids.

We think it would be a waste of time of the Court to attempt any further elucidation on the point, now that we direct attention to the controlling factor in the case. Our Statute in question was the statute of California at the time our codes were adopted; and, at that time the California Court had given the statute the construction we now contend for. The same construction will be given this adopted statute by our Court. See following cases:

Mares v. Mares, 60 Mont 36, 199 Pac 267.

State ex rel. Rankin v. State Board, 59 Mont 557, 197 Pac 988.

Haydon v. Normandia, 55 Mont 539, 179 Pac 460.

Steckpole v. Hallahan, 16 Mont 40, 28 L.R.A. 502, 40 Pac 80.

Largey v. Chapman, 18 Mont 563, 46 Pac 808.

Price v. Lush, 10 Mont 61, 9 L.R.A. 467, 24 Pac 749.

Butte & B. Consolidated Min Co. v. Montana Ore Purchasing Company, 25 Mont 41, 63 Pac 825. [58]

Miller v. Miller, 47 Mont 150, 131 Pac 23.

We are asking the Court to read in the light of this analysis the discussion of the Courts in the case cited by the Defendant. It will be found that

the reasoning of the Court does not apply to the facts like these. This Complaint does not charge embezzlement, neither is it based upon a set of facts disclosing that the mortgagee bid in the property itself. In cases where the mortgagee bid in the property itself rather than selling them to another, the Courts have said that it does not constitute alienation within the terms of the statute like ours, there being no charge in the status of the parties. In such cases, however, there still is a liability and the common law rule has not been superseded. Where there is actual fraud, the fraud then becomes an issue in the matter. Here, however, the record discloses that the property was sold to various individuals. It (the mortgaged property) was sold, "alienated" by the mortgagee under a power of sale, the right to exercise which was suspended by the statute in the interim between death and the appointment of an administrator. It needs no argument to enforce the purpose and high policy of such a statute. Were the mortgagee alive, or being dead, his representative appointed, someone is in existence who has an interest in the matter sufficient to cause every endeavor to be made to protect the property rights. It is to be conceived that a mortgagee can easily dispose of property amounting to a value more than the mortgage debt for the amount of the mortgage debt, or less, where there was no one to protect the mortgagor's rights or those of his successors in interest. The Complaint in this case makes it clear that valuable property,

far in excess of the amount of the mortgage debt, was so hastily disposed of as to leave a balance of the debt remaining. Moreover, the Court will observe in this case that two mortgages were executed by the decedent. See Exhibit "A" and "B" to Plaintiff's [59] Complaint. The first of those mortgages was for \$17,000.00, payable December the 15th, 1934. (Exhibit "A") Apparently this mortgage matured and was renewed on the 19th day of December, 1934, (Exhibit "B").

In Paragraph II of Plaintiff's Complaint, near the close of the Paragraph, attention is directed to the fact, in substance, that this latter mortgage admits that it (Exhibit "B") is a renewal and continuation of the indebtedness secured by the other mortgage. We come then to Exhibit "C", which is the statutory return of sale under the chattel mortgage foreclosure where power of sale provisions are employed. The report discloses that the Defendant purported to sell under Exhibit "A" property included in a mortgage not yet due. We think that one could seize for protection purposes under the powers granted in a chattel mortgage, property mortgaged, even during the prescribed period. That is not prohibited by the statute, but to go so far as to permit the sale of the property for a debt not yet due, in addition to such seizure, is defying the statute.

We respectfully submit to the Court that the Complaint states a good cause of action; that the things which Defendant now seeks to have stricken

from the Complaint are the things which meet its contention that good faith is an element in the case. If good faith does enter in, then that is a matter of defense. We do not concede that good faith is an issue, nor do the authorities, applicable to the facts, sustain the Defendant in cases of this character.

We respectfully submit that the Demurrer should be overruled.

Respectfully submitted.

BELDEN & DEKALB,

RAYMOND E. DOCKERY,

Attorneys for the Plaintiff.

[Endorsed]: Filed Oct. 17, 1935. C. R. Garlow,
Clerk. [60]

Thereafter, on October 28, 1935, Defendant's Reply Brief was duly filed herein, being in the words and figures following, to wit: [61]

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

Plaintiff's reply brief on the demurrer herein has been received and the authorities and contents thereof noted.

The first impression created by such brief was this: why did the plaintiff omit all argument and reference to the controlling Montana case of

Muth v. Goddard, 28 Mont. 237; 98 Am. St.
Rep. 553,

referred to in defendant's brief in chief. That case sets forth the rule in no uncertain terms that in Montana, where a mortgage contains a power of sale, the holder thereof "Could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected." That rule, we submit in all sincerity, is determinative of the question involved in the case at bar. If plaintiff desires the Court to overrule the demurrer, it seems to the writer that they must first upset the *Muth v. Goddard* case, *supra*, or show that the decision in that case has been subsequently overruled or modified. That case, in the humble judgment of the writer hereof, constitutes an insuperable barrier to the maintenance of the present action.

Totally disregarding the law in Montana, plaintiff continues to refer to cases from the State of Oklahoma and on page two of the brief occurs the following: [62]

"Oklahoma recognizes that such a provision is a power coupled with an interest, but has confined the exercise of that power to cases where an administrator has been appointed. *Western Newspaper Union v. Thurmond*, 111 Pac. 204."

Counsel is in error as regards the holding of the Court. What the Court does hold is the following:

"As by virtue of the terms of the mortgage on condition broken, the mortgagee had a right to the possession of the mortgaged property

(*Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344), the judgment is contrary to law and is therefore reversed and rendered.”

Thus, it will be seen, that as regards mortgages containing a power of sale, the Oklahoma Court is in accord with Vermont, also with Montana, California, and other western states, in holding that on condition broken, the mortgagee has a right to the possession of the mortgaged property, and there is not one word in the opinion, which says, as is claimed by plaintiff, that the exercise of such power is limited to cases where an executor or administrator has been appointed. Quite the contrary; it appears that the Oklahoma case is based upon the California case of

Mathew v. Mathew, 71 Pac. 344,

which case sustains defendant's contention in the present case and is in accord with the Montana case of *Muth v. Goddard*, *supra*. We quote from the *Mathew* case the following:

“It is true that under section 2888 of our Civil Code the legal title of mortgaged property is in the mortgagor, and yet at the same time it must be admitted that the mortgagee has an interest in the mortgaged property; and here, this interest being by the very terms of the mortgage contract coupled with a right of possession, the refusal to yield that possession on demand amounted to a deprivation of a valuable right which the mortgagee had in the

property, and was a conversion of his interest in such property . . . *The death of the mortgagor did not affect the rights of the mortgagee under the contract, and the executor possessed no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime. On default in the payment of the note, [63] the mortgagee had the right of possession of the property as well against the executor of the mortgagor as against the mortgagor himself.* It is equally clear that the executor cannot avoid personal responsibility for his tortious act by claiming that it was committed for the benefit of the estate under the order of the court. He was not ordered by the court to refuse to deliver property, the rightful possession of which was in the party demanding it.” (Italics ours)

It is obvious from the foregoing quotation that the plaintiff finds himself in the embarrassing position of having his Oklahoma Court declaring a rule of law which renders his position in the present case untenable.

The Oklahoma case of

Sauls v. Whitman, 42 Pac (2d) 275,

referred to and quoted from on pages four and five of plaintiff's reply brief, has no bearing on the issue of law before the Court and is not in point for the reason that no question of a power of sale coupled with an interest was involved in that case.

On page 7 of the Reply Brief, plaintiff's counsel make this representation to the court:

“It (the mortgaged property) was sold, ‘alienated’ by the mortgagee under a power of sale, the right to exercise which was suspended by the statute in the interim between death and the appointment of an administrator.”

The Montana court, in the Muth case, *supra*, the Oklahoma court in the Thermond case, *supra*, and the California Court in the Mathews case, *supra*, all follow the obviously sensible rule, that the death of the mortgagor does not affect the power of sale in a mortgage. Counsel for plaintiff alone seem to be the authors of the rule that the power of sale is suspended between the death of the mortgagor and the appointment of an administrator. No authorities are cited to sustain their contention, while the Thermond case, cited by them, demonstrates the fallacy of it. So also does the Montana case cited by the defendant (Muth vs. Goddard) and the Mathews case from California.

On page 8 of the Reply Brief, some irrelevant argument is indulged in regarding the second mortgage, attached to the complaint as Exhibit “B”. The complaint shows that the defendant was acting pursuant to the power of sale contained in Exhibit “A” (see [64] Exhibit “C”, Notice of Sale, and Exhibit “D”, Return of Sale, attached to complaint). No allegation is made in the complaint that the mortgagee was not entitled to proceed under the

earlier mortgage; impliedly, at least, it is admitted that the mortgagee had such right save for the death of the mortgagor. Hence, it is submitted that the allegations of the complaint do not justify, nor will they support, the attempted argument above referred to.

In conclusion, it is respectfully submitted that the learned counsel for the plaintiff have wholly failed to meet or answer the arguments advanced by the defendant with reference to the power of sale feature of the case and that the authorities presented to this court amply sustain the action of the mortgagee in foreclosing the mortgage in question under the power of sale therein contained following the death of the mortgagor; and that the demurrer should be sustained.

The writer hereof finds no authority in the rules of court for the filing of a reply brief in a case like this. However, counsel for plaintiff have assumed to file a reply brief and by the same token defendant files its reply.

Respectfully submitted.

J. R. WINE,

Attorney for Defendant.

Filed Oct. 28, 1935. C. R. Garlow, Clerk. [65]

Thereafter, on November 29, 1935, an Amended Complaint was duly filed herein, being in the words and figures following, towit: [66]

[Title of District Court and Cause.]

AMENDED COMPLAINT

By leave of Court, Plaintiff files this, his amended Complaint, and for cause of action against the Defendant, complains and alleges:

I

That by an order of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, duly given and made on the 4th day of April, 1935, the Plaintiff was appointed, and now is the duly appointed, qualified and acting administrator of the Estate of Simon T. Douglas, deceased, and has qualified therein by executing the bond and taking the oath prescribed by law.

II

That before the appointment of Plaintiff, or any administrator, or executor, whatsoever for the estate of Simon T. Douglas, deceased, and after the death of Simon T. Douglas, deceased, which occurred on the 12th day of January, 1935, to wit on or about February 5th, 1935, the Defendant wrongfully took into its possession, sold, alienated, converted and disposed of to its own use, property and effects of said decedent, and of which said decedent had been up to the time of his death, and his estate and Plaintiff since said time was and were, lawfully possessed, consisting of

1453 1934 ewe lambs and a few wethers

1080 old ewes

1273 two, three, four and five year old ewes
21 head of horses
308 sacks of molasses cake
236 rams, bucks and old bucks
36 tons of hay
800 Bushel of oats
90 tons of oat hay
and

wagons, trucks, automobiles, camp outfits, saddles, harnesses, [67] mowers, hay racks, stackers, loaders, and all other and similar ranch and farm machinery, said property being of the value of \$31,500.20, and to the damage of the estate of which the Plaintiff is administrator in double said value as hereinafter set forth.

III

That said property was so wrongfully alienated and converted at a time intermediate the death of Simon T. Douglas, deceased, and the appointment of Plaintiff as aforesaid as such administrator, and before the appointment of any administrator or executor, and all contrary to the provisions of Section 10140 of the Revised Codes of the State of Montana, for the year 1921, reading as follows, towit:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor

or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

Wherefore, Plaintiff prays judgment against the Defendant for the sum of \$63,000.00, the same being double the value of the said property so converted by Defendant, and for Plaintiff's costs and disbursements herein expended and incurred.

BELDEN & DeKALB

RAYMOND E. DOCKERY

Attorneys for the Plaintiff.

State of Montana

County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Amended Complaint and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such attorney; that affiant makes this affidavit for the reason that said plaintiff is not present within the County of Fergus, State

of Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY.

Subscribed and sworn to before me this 27th day of November, 1935.

(Seal)

MAXINE SINGLEY

Notary Public for the State of Montana. Residing at Lewistown. My commission expires Sept. 21, 1938.

[Endorsed]: Filed Nov. 29, 1935. C. R. Garlow, Clerk. [68]

Thereafter, on December 3, 1935, a Demurrer to the Amended Complaint was duly filed herein, which is in the words and figures following, towit: [69]

[Title of District Court and Cause.]

DEMURRER

Comes now the above named defendant and demurs to the amended complaint of said plaintiff on file herein upon the ground and for the reasons:

I.

That said complaint fails to state facts sufficient to constitute a cause of action against said defendant.

II.

That said amended complaint is ambiguous, unintelligible and uncertain in the following particu-

lars, to-wit: that it cannot be ascertained from said amended complaint if the defendant is sued as a partnership, joint stock company, corporation or otherwise, in that there is no allegation in such amended complaint as to the capacity of the said defendant to appear as a party litigant or to be sued and if it is intended by plaintiff to claim that said defendant is a corporation, there is no allegation to the effect.

J. R. WINE

Attorney for Defendant.

[Endorsed]: Filed Dec. 3, 1935. C. R. Garlow, Clerk. [70]

Thereafter, on May 12, 1936, an Order Overruling Demurrer to Amended Complaint was duly entered herein, being in the words and figures following, towit: [71]

[Title of District Court and Cause.]

This cause was duly called for hearing this day for arguments on Demurrer to Amended Complaint, there being no appearance by counsel for either side. Thereupon it appearing to the court that counsel have agreed that the demurrer may be overruled and 30 days be granted to answer, the court, after due consideration, ordered the demurrer overruled and granted 30 days to defendant to answer.

Entered in open court May 12, 1936, at Great Falls, Montana.

C. R. GARLOW, Clerk. [72]

Thereafter, on June 25, 1936, an Answer and Cross Complaint was duly filed herein, being in the words and figures following, towit: [73]

[Title of District Court and Cause.]

ANSWER AND CROSS COMPLAINT

Comes now the above named defendant and for its answer to the amended complaint of the plaintiff on file herein, admits, alleges and denies as follows:

I.

Admits the allegations of Paragraph I of said amended complaint.

II.

Denies generally each and all the allegations of Paragraphs II and III of said amended complaint.

III.

Save and except as herein admitted, defendant generally denies each and every allegation, matter and thing in said amended complaint contained.

For a Further Answer and Affirmative Defense to Said Amended Complaint, and By Way of Cross-Complaint thereto, Defendant Alleges:

I.

That the defendant, the Regional Agricultural Credit Corporation of Spokane, Washington, hereinafter called the corporation, is duly organized

and existing under and by virtue [74] of Section 201 (e) of an Act of Congress of the United States known and cited as the Emergency Relief and Construction Act of 1932 (12 U. S. C. Section 1148) and has its principal place of business in the City of Helena, County of Lewis and Clark, and State of Montana; that the said Corporation is an instrumentality of the United States; that, pursuant to the Act aforementioned, all capital of the Corporation was subscribed for by the Reconstruction Finance Corporation, a governmental agency created, capitalized and owned by the United States; and that the capital so subscribed was paid for out of money specifically appropriated and made available for that purpose by Congress; that all property of the Corporation was obtained by the use of money furnished by the United States through its said agency, the Reconstruction Finance Corporation, and that such property is and at all times has been used by the Corporation solely as a means to the accomplishment of the public purposes for which it was created; that no one will receive any profit or dividend from the business or property of the Corporation; that the Corporation is operated and managed under rules and regulations prescribed by the Farm Credit Administration, by officers and agents appointed by the Farm Credit Administration, an independent office or establishment of the Government of the United States; that all expenses incurred in connection with the operation of the

Corporation are paid by the Reconstruction Finance Corporation, which is wholly owned and operated by the United States as a governmental agency, and that any loss which may be sustained in the operation of the Corporation will result in a loss to the United States; that all of the capital stock of the Corporation and property owned by it, including the note and mortgage herein sued upon, are beneficially owned by the United States of America; that the Corporation, in pursuance to the [75] authority granted to it, has heretofore engaged in the business of making loans on livestock and other personal property, such loans being evidenced by promissory notes secured by chattel mortgages describing the security of such loan.

II.

That on and prior to the 27th day of December, 1933, one Simon Douglas was the owner, in the possession and entitled to the possession of certain livestock and other personal property, including the property mentioned and described in plaintiff's amended complaint; that in pursuance to the authority granted to the Corporation on and prior to the 27th day of December, 1933, and on said 27th day of December, 1933, the said Simon Douglas, for a valuable consideration, made, executed and thereafter delivered to Regional Agricultural Credit Corporation of Spokane, Washington, the above named defendant, his certain promissory note in the words and figures following, to-wit:

“Due December 15, 1934 No. 12413 \$17,000.00

Helena, Montana, December 27, 1933.

December 15, 1934.....after date, for value received, we and each of us, jointly and severally, promise to pay to the order of the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the City of Helena, State of Montana Seventeen Thousand and no/ 100 Dollars, with interest at the rate of Six and One-half ($6\frac{1}{2}$) per cent per annum from date hereof, payable at maturity.

In the event this note is placed after maturity in the hands of an attorney for collection or suit is brought on the same, or any portion thereof, we and each of us, jointly and severally, further agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

The makers and indorsers of this note severally waive presentment for payment, demand, protest, and notice of non-payment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

(Signed) SIMON DOUGLAS

Address Armells, Montana.”

III.

That to secure the payment of said promissory note, [76] and to secure additional future advances,

if any, not in excess of \$20,000.00, the said Simon Douglas, on said 27th day of December, 1933, made, executed and thereafter delivered to said defendant, as mortgagee, his certain chattel mortgage, dated on said date, covering the livestock and other personal property therein described, which said chattel mortgage was duly and regularly signed and acknowledged by said Simon Douglas, and had endorsed thereon a written receipt by him for a true copy of said mortgage, and there was also attached to said chattel mortgage an affidavit on behalf of the mortgagee, as required by law, that said mortgage was made in good faith to secure the amount named therein without any design to hinder, delay or defraud creditors of the mortgagor, and said mortgage was thereafter and on the 8th day of January, 1934, at the hour of 4.55 o'clock P. M., of said day, duly filed in the office of the County Clerk of Fergus County, Montana, and remains as a file and record of said office, and that said chattel mortgage and the record thereof is hereby referred to and by this reference made a part hereof; that a true copy of said mortgage is hereunto attached, marked Exhibit "A", hereby referred to and by this reference made a part hereof.

IV.

That thereafter the said Simon Douglas died intestate in Fergus County, Montana, on or about the 12th day of January, 1935.

V.

Defendant further alleges that the aforementioned indebtedness was not paid at maturity, or otherwise, or at all, by the said Simon Douglas, or any one else, and that on or about the 27th day of November, 1934, said Simon Douglas filed a written application with said defendant for a renewal and a continuation of said mortgage indebtedness; that pursuant to said application a new note dated the 19th day of December, 1934, was signed by said Simon Douglas [77] and a new chattel mortgage of even date therewith was executed by him as security therefor, and said last mentioned chattel mortgage was filed in the office of the County Clerk of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., of said day. Defendant further alleges that said application for a renewal loan was never closed or completed, and no money was ever loaned and no advances were ever made thereunder, and said renewal loan was never completed or closed, by reason of the death of said Simon Douglas, as hereinbefore set forth; that as part of the standard procedure of said defendant in making loans secured by chattel mortgage or chattel mortgages, said loans were never closed or completed until after the approval thereof by the local counsel for said defendant. And in this connection the defendant alleges that the contemplated renewal or continuation loan, intended to be secured by the last mentioned chattel mortgage, dated December 19, 1934, as aforesaid, was never

submitted to nor approved by said local counsel by reason of the death of the said Simon Douglas, as hereinbefore set forth.

VI.

Defendant further alleges that immediately after the death of said Simon Douglas, defendant was obliged to, and did, employ help to care for and preserve the personal property and security mentioned and described in said chattel mortgage, dated the 27th day of December, 1933, for the reason that no heir of the said Simon Douglas, nor any personal representative of his, nor any other person, assumed or pretended to care for, protect or preserve such security, and that no person was appointed administrator of the estate of said deceased until on or about the 9th day of April, 1935.

VII.

Defendant further alleges that on the date of his death, [78] to-wit: January 12, 1935, the said Simon Douglas was indebted to said defendant in the amount of \$16,328.48, inclusive of interest at the rate of six and one-half ($6\frac{1}{2}$) per cent per annum, on said mortgage indebtedness.

VIII.

That for the purpose of protecting the said security and the interests of said defendant, as well as the interests of the estate of said Simon Douglas, deceased, and in pursuance of the power of sale contained in said chattel mortgage dated the 27th

day of December, 1933, as well as in pursuance of the statute in such case made and provided, the said defendant by reason of the default in the conditions of said chattel mortgage, and on the 28th day of January, 1935, posted five notices of said sale respectively, in five public places in said Fergus County, Montana, one of said notices being posted at the designated place of sale, said notices specifying that said property would be sold on the 5th day of February, 1935, at the hour of 2:00 o'clock P. M. at the ranch of said mortgagor, Simon Douglas, located fourteen miles northeast from Armells, in said Fergus County, Montana; that on said 5th day of February, 1935, at the hour of 2:00 o'clock P. M., at said above mentioned ranch of said mortgagor, in said Fergus County, said defendant proceeded to sell and did sell at public auction, pursuant to the power of sale contained in said chattel mortgage, to the highest respective bidders for cash, the said property described in said chattel mortgage; that the respective purchasers, the property so sold, and the prices paid therefor are as follows, to-wit: [79]

Daily Johnson:	1934 ewe lambs and few wethers at \$4.10, 1453 head.....	\$ 5,957.50
O. A. Nepstad:	Old band of ewes at \$2.25—1080 head.....	2,430.00
H. Lingshire:	Young band of ewes at \$3.40—1238 head.....	4,205.80
Matt Wildschultz:	21 head of horses	860.00
Fergus Ranch Co.:	308 sacks molasses cake at \$1.30 per sack.....	400.40
Tom Wight:	256 cut back lambs and ewes; some old bucks.....	110.00
Mike Machler:	Machinery, tools, etc., as follows: 1 Ford coupe, small tools, 3 shovels, 2 spades, 2 iron bars, 2 hand saws, 2 cross cut saws, 1 vice, 1 anvil, 1 square, 3 log chains, 2 sheep hooks, forge, 5 axes, 1 hand rake, 1 pitch fork, 7 lanterns, 2 pack saddles, 4 sets harness; 1 potato cultivator, 1 snow plow, 1 power wood saw, 1 Twin City Tractor, 1 potato planter, 2 bull rakes, 1 hay rake, 1 hay stacker, 3 sheep wagons, 2 mowers, 2 bob sleds, 2 hay racks, 1 truck wagon, 2 wagons, 1 two wheel cart, 4 pack saddle bags, 2 saddles, 1 stop, 40 tepee tents, 3 lambing tents, 15 panels, 35 sheep pelts, 30 small panels, 46 tons old hay, very poor at \$2.10.....	435.00
H. R. Cameron:	800 bu. oats at \$1.50.....	96.80
Tom Wight:	Oat hay and Blue Joint, for \$4.25 T. 90 tons later resold to D. G. Disbrow for \$5.50.....	12.00
J. A. Robins, Trustee:		495.00
	Total.....	\$15,002.10

that the total gross amount received for such property was and is the sum of \$15,002.10, which said sum defendant alleges was and is the real and market value of said mortgaged property and all thereof on said date; that within ten days thereafter, to-wit: on the 15th day of February, 1935, the said defendant, as required by law, filed a return of sale under said chattel mortgage foreclosure, pursuant to the statute in such case made and provided, in the office of the County Clerk of Fergus County, Montana, and the same was attached to the said chattel mortgage as required by law, which said return and the record thereof is hereby referred to and by this reference made a part hereof; that a true copy of said return (which has attached thereto a copy of the "Notice of Sale", hereinbefore mentioned) is hereto attached, marked Exhibit "B", hereby referred to and by this reference made a [80] part hereof; that the personal property mentioned and described in plaintiff's amended complaint herein constitutes a portion of the personal property mentioned and described in said chattel mortgage dated December 27, 1933, and in said return of sale thereunder; that neither said chattel mortgage nor the hereinbefore mentioned sale thereunder, nor the return of sale under said chattel mortgage, hereinbefore referred to, nor any one of them, has been vacated, annulled, set aside, or adjudged or decreed to be invalid or void, and that the same and all thereof remain and still are in full force and effect.

That every act done and thing performed by the said defendant in connection with said sale, as the mortgagee named in said chattel mortgage dated December 27, 1933, was done and performed in accordance with and pursuant to the terms and provisions of said chattel mortgage and the power of sale therein contained, and lawfully and in accordance with the statutes of the State of Montana.

IX.

That said chattel mortgage sale, hereinbefore mentioned, is the identical sale mentioned and referred to in plaintiff's amended complaint on file herein, and the only sale ever made or conducted at any time by the defendant, of property owned or claimed by said Simon Douglas, deceased, or his estate, or his personal representative.

X.

That on February 5th 1935, the date of said sale, the amount due said defendant on said chattel mortgage indebtedness was the sum of \$16,388.92, and that the gross proceeds of said sale amounted to the sum of \$15,002.10, and that the net proceeds of said sale amounted to the sum of \$14,694.28, and the account of said Simon Douglas was given credit for said amount, and that [81] after applying the credit for said net proceeds of said sale, there remained, and now remains, a balance of \$1,694.64 owing to the above named defendant on said chattel mortgage indebtedness, besides interest thereon from the 5th

day of February, 1935, at the rate of 6½% per annum.

XI.

That on the 13th day of June, 1936, at Lewistown, Fergus County, Montana, the claim for the balance hereinbefore set forth, verified by the oath of H. W. Dickey, Secretary of defendant corporation, in behalf of the claimant, and upon which this cross-complaint is founded, was duly presented in writing by the defendant to the said plaintiff, as such administrator, for allowance, but that said administrator refused or neglected to endorse such allowance or rejection for ten days after the claim had been presented to him and the said defendant elects, at its option, to consider such refusal and/or neglect as being deemed equivalent to rejection of such claim on the tenth day after such presentation; that a true copy of said claim (excepting the copy of the note and the copy of the mortgage thereto attached, which are omitted for the sake of brevity, as the note is set out verbatim in Paragraph II of the cross-complaint, and a copy of said chattel mortgage is attached to the cross-complaint as Exhibit "A") as presented, is hereunto attached, marked Exhibit "C", hereby referred to and by this reference made a part of this cross-complaint; that the time for presentation of claims against said estate has not yet expired.

Wherefore, having fully answered defendant prays judgment as follows:

1.

That said amended complaint be dismissed, and that plaintiff take nothing by his said action. [82]

That the defendant have judgment against said plaintiff for the sum of \$1,694.64, together with interest thereon at the rate of 6½% per annum from February 5, 1935, until paid, and for such other and further relief as may be meet and equitable in the premises; and for costs of suit herein incurred.

J. R. Wine,

Attorney for Defendant.

State of Montana,

County of Lewis and Clark—ss.

H. H. Pigott, being first duly sworn on oath, deposes and says:

That he is an officer, to-wit: Executive Vice President and Manager of defendant corporation; that as such officer he makes this verification for and on behalf of said defendant; that he has read the foregoing answer and cross-complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

H. H. PIGOTT,

Subscribed and sworn to before me this 23rd day of June, 1936.

A. E. REDINGTON,

Notary Public for the State of Montana, residing at Helena, Montana.

My Commission expires October 18th 1939.

[Seal]

[Endorsed]: Filed June 25, 1936. C. R. Garlow,
Clerk. [83]

Thereafter, on July 29, 1936, a Reply was duly filed herein, being in the words and figures following, to-wit: [84]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, and for reply to defendant's further answer and affirmative defense and counterclaim herein, denies, admits, qualifies and alleges:

I.

Admits that defendant is a corporation organized and existing under and by virtue of Section 1148, Title 12 U. S. C. A., with its principal office and place of business at Helena, Montana, and has been engaged in making loans on livestock and other personal property; but denies each and every other allegation, matter and thing in Paragraph I of said further answer and affirmative defense and cross-complaint; and alleges that if said other allegations are true, they are superfluous and immaterial.

II.

Admits Paragraph II, except that plaintiff de-

nies that some of the property described in plaintiff's amended complaint was on the 27th day of December, 1933, owned by Simon Douglas.

III.

Admits Paragraphs III and IV of said further answer and affirmative defense and cross-complaint.

[85]

IV.

Admits that the indebtedness was not paid in full at maturity and a new note dated December 19, 1934, was signed by Simon Douglas and a new chattel mortgage executed, delivered and filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December 1934, at 4:00 o'clock P. M., and denies each and every other allegation, matter and thing in Paragraph V of said further answer and affirmative defense and cross-complaint; and plaintiff further avers that said chattel mortgage dated December 19, 1934 operated to and did annul said mortgage of December 27th, 1933, and novated the debt and the relationship of the said parties as therein set forth, and a copy thereof is hereunto annexed marked Exhibit A and by reference thereto made a part thereof.

V.

Admits that no administrator of the estate of Simon Douglas was appointed until April 9, 1935,

but denies each and every other allegation of Paragraph VI of said further answer, affirmative defense and cross-complaint.

VI.

Denies the allegations of Paragraph VII of said further answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

VII.

Admits that on the 28th day of January, 1935, defendant posted purported notices of sale under the Chattel mortgage, copy of which said notice is included in the marked Exhibit B. annexed to defendant's answer, fixing February 5, 1935, at two o'clock P. M. for sale of the property in the said chattel mortgage dated December 27th, 1933, listed and described, and that [86] on February 5, 1935, purportedly sold the said property, and made a purported return of said alleged sale, for some sum which plaintiff believes to be as alleged, viz: \$15,002.10; but denies each and every other allegation, matter and thing in Paragraph VIII of said further answer and affirmative defense and cross-complaint contained. That said sale and all proceedings thereunder was and were void, and in violation of Section 10140 of the Revised Codes of Montana for the year 1921, and for the year 1936.

VIII.

Admits that said purported chattel mortgage sale is the sale referred to in plaintiff's amended complaint and the only purported sale ever made or conducted at any time by defendant of property owned or claimed by Simon Douglas, deceased, or his estate.

IX.

Denies the allegations of Paragraph X of said further answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

X.

Admits the allegations of Paragraph XI of defendant's further answer and affirmative defense and cross-complaint herein.

Wherefore, having fully replied to defendant's further answer and affirmative defense and cross complaint, plaintiff prays judgment as demanded in his amended complaint herein.

BELDEN & DEKALB

RAYMOND E. DOCKERY.

Attorneys for Plaintiff.

[Endorsed]: Filed July 29, 1936. C. R. Garlow, Clerk. [87]

State of Montana,
County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Reply and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such attorney; that affiant makes this affidavit for the reason that said Plaintiff is not present within the County of Fergus, State of Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY

Subscribed and sworn to before me this 29th day of July, 1936.

(Seal)

GUY M. BRISLAWN,

Notary Public for the State of Montana, residing
at Lewistown, Montana. My Commission expires April 24, 1939. [88]

Thereafter, on August 18, 1936, a Motion to Strike from Reply was duly filed herein, being in the words and figures following, towit: [89]

[Title of District Court and Cause.]

MOTION TO STRIKE.

I.

Comes now the above named defendant and moves the Court to strike from the so-called reply of the plaintiff herein (said pleading in fact being an answer to defendant's cross complaint), the following designated portion thereof, towit:

“and alleges that if said other allegations are true, they are superfluous and immaterial.”

appearing in the last two lines of paragraph I of said so-called reply, upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;
- (c) That the same is superfluous;
- (d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law.

II.

Defendant further moves the Court for an order to strike from paragraph designated IV that portion appearing at the end of said paragraph and being the first five lines at the top of page 2 of said so-called reply and reading as follows:

“and plaintiff further avows (avers) that said chattel mortgage dated December 19, 1934, operated to and did annul said mortgage of December 27th, 1933, and novated the debt and the relationship of the said parties as therein

set forth, and a copy thereof is hereunto annexed marked Exhibit A and by reference thereto made a part hereof.”

upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;
- (c) That the same is superfluous;
- (d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law;
- (e) That the defense of novation is a special defense and must be especially pleaded; that the facts constituting the alleged novation must be set forth: that the portion of the pleading above quoted omits the essential facts necessary to constitute a defense on the grounds of a novation or on any other grounds. [90]

III.

Defendant further moves the Court for an order to strike from paragraph designated VII of plaintiff's so-called reply the following language appearing at the end of said paragraph, to-wit:

“That said sale and all proceedings thereunder was and were void, and in violation of Section 10140 of the Revised Codes of Montana for the year 1921, and for the year 1936.”

upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;

(c) That the same is superfluous;

(d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law.

This motion is made and is to be considered as a separate motion to each of the above designated portions of the so-called reply and is made and based upon the records, files, pleadings and papers herein.

Attorney for Defendant.

[Endorsed]: Filed August 18, 1936. C. R. Garlow,
Clerk. [91]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above Named Plaintiff and to Raymond E.
Dockery, Esq., and Messrs. Belden & De Kalb,
His Attorneys:

You and each of you will please take notice and you are hereby notified that the above named defendant will call up for hearing and determination and present to the above entitled Court the annexed Motion to Strike in the courtroom of said Court in the Federal Building in the City of Great Falls in said State and District at ten o'clock in the forenoon on Monday, the 31st day of August, 1936, or as soon thereafter as counsel can be heard.

Dated August 18th, 1936.

J. R. WINE,

Attorney for Defendant.

[92]

Thereafter, on November 6, 1937, an Amended Reply was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

AMENDED REPLY

Comes Now, the Plaintiff, and for reply to Defendant's further Answer and affirmative defense and counterclaim herein, denies, admits, qualifies and alleges:

I.

Admits that Defendant is a corporation, organized and existing under and by virtue of Section 1148, Title 12 U. S. C. A., with its principal office and place of business at Helena, Montana, and has been engaged in making loans on livestock and other personal property; but, denies each and every other allegation, matter and thing in Paragraph I of said further Answer and affirmative defense and cross-complaint.

II.

Admits Paragraph II, except that Plaintiff denies that some of the property described in Plaintiff's amended Complaint, was on the 27th day of December, 1933, owned by Simon Douglas.

III.

Admits Paragraphs III and IV of said further Answer and affirmative defense and cross-complaint. [94]

IV.

Admits that the indebtedness was not paid in full at maturity and a new note, dated December 19, 1934, was signed by Simon Douglas and a new chattel mortgage executed, delivered and filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., and denies each and every other allegation, matter and thing in Paragraph V of said further answer and affirmative defense and cross-complaint; and, Plaintiff further avers that said chattel mortgage, dated December 19, 1934, was given and received in satisfaction of and as a substitution for said mortgage of December 27th, 1933, and, then and thereafter, the rights and obligations of the said parties were as in said later mortgage, set forth, and a copy of said later mortgage is hereunto annexed, marked Exhibit "A", and by reference thereto made a part hereof.

V.

Admits that no Administrator of the Estate of Simon Douglas was appointed until April 9, 1935, but denies each and every other allegation of Paragraph VI of said further Answer, affirmative defense and cross-complaint.

VI.

Denies the allegations of Paragraph VII of said further Answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27, 1933.

[95]

VII.

Admits that on the 28th day of January, 1935, Defendant posted purported notices of sale under the chattel mortgage, copy of which notice is included in the marked Exhibit "B", annexed to Defendant's Answer, fixing February 5, 1935, at two o'clock, P. M., for sale of the property in the said chattel mortgage, dated December 27th, 1933, listed and described, and that on February 5th, 1935, purportedly sold the said property, and made a purported return of said alleged sale, for some sum which Plaintiff believes to be alleged, viz: \$15,002.10; but denies each and every other allegation, matter and thing in Paragraph VIII of said further Answer and affirmative defense and cross complaint contained.

VIII.

Admits that said purported chattel mortgage sale is the sale referred to in Plaintiff's amended Complaint and the only purported sale ever made, or conducted, at any time by Defendant of property, owned or claimed, by Simon Douglas, deceased, or his estate.

IX.

Denies the allegations of Paragraph X of said further Answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

X.

Admits the allegations of Paragraph XI of Defendant's further Answer and affirmative defense and cross-complaint herein.

Wherefore, having fully replied to Defendant's further Answer and affirmative defense and cross-complaint, Plaintiff prays judgment as demanded in his amended Complaint herein.

H. LEONARD DeKALB,
RAYMOND E. DOCKERY.

Attorneys for Plaintiff. [96]

State of Montana,
County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Amended Reply and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such Attorney; that affiant makes this Affidavit for the reason that said Plaintiff is not present within the County of Fergus, State of

Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY,

Subscribed and sworn to before me this 30th day of October, 1937.

META K. BOYER,

Notary Public for the State of Montana. Residing at Lewistown. My commission expires August 23, 1940.

(Notarial Seal)

[Endorsed]: Filed Nov. 6, 1937. C. R. Garlow, Clerk. [97]

EXHIBIT "A"

This Mortgage, Made the 19th day of December in the year 1934 by Simon T. Douglas, (whose postoffice address is Armalls, State of Montana), mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, (maintaining a branch at Helena, Montana) mortgagee:

(The word "mortgagor" whenever herein used means "mortgagors" if there be more than one mortgagor; and where the word "mortgagee" is used herein it shall include the successors and assigns of the mortgagee; and words used herein in the masculine gender include the feminine and neuter and the singular number includes the plural and the plural the singular.)

Witnesseth: That for a valuable consideration, to-wit: a loan or loans of money, the mortgagor

mortgages to the mortgagee the following described personal property situated, at the time of the execution of this mortgage, in the County (or Counties) of Fergus, and Judith Basin, State of Montana, to-wit:

All cattle, horses, sheep, tools, machinery, and equipment of every kind, character, and description owned by the mortgagor, inclusive of the following:

3 cows

These 3 cows are, or are to be, branded YD on right hip.

22 horses

There are also included in this mortgage any and all cattle and horse brands belonging to the mortgagor or recorded in the mortgagor's name.

200 ewes one year old

150 ewes two years old

50 ewes three years old

50 ewes four years old

700 ewes five years old

1156 ewes six years old

50 ewes aged

1653 ewe lambs

114 wether lambs

60 mixed lambs

88 bucks

1424 other sheep appraised and to be sold to the Agricultural Adjustment Administration.

All above sheep marked: Z on back with red or black paint.

All forage crops and other livestock feed growing or to be grown on lands owned, leased or controlled by mortgagor during the year 1935 or next maturing after the date hereof.

Also: All hay and other livestock feed now owned, or hereafter acquired, during the life of this mortgage, by purchase, harvest or otherwise, inclusive of the following: 265 tons of hay.

Also: All unsold 1934 wool.

The indebtedness secured hereby, or part hereof, is a renewal and continuation of the indebtedness secured by mortgage, or mortgages, between the parties hereto now on file in the office of the County Clerk of the above named county, or counties.

The marks and brands used to describe the livestock are holding marks and brands and carry the title although said livestock may have other marks and brands. This mortgage is intended to include and there is included herein all increase of like kind or progeny, also the wool of animals described herein from year to year during the life of the mortgage.

There is also included herein and mortgaged hereby all wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stackers, loaders and other similar ranch or farm machinery. Also all water, grazing or right of way privileges, permits or agreements. There is further mortgaged and included herein all hay, straw, range, forage and other livestock feed now owned by mortgagor, or hereafter acquired by harvest, purchase

or otherwise during the life of this mortgage provided, however, such livestock feed may be used solely for the purpose of feeding the livestock mortgaged herein and for no other purpose. It is understood, agreed and covenanted that this mortgage shall and it does mortgage all of the property covered by specific or general description herein of the kind or character referred to in any manner acquired by the mortgagor during the life of this mortgage, unless expressly excepted in the type-written portion hereof. While exchanges or substitutions are covered by this mortgage, none shall be permitted except by written consent of the mortgagee in each separate instance. The mortgagee and/or any holder of this mortgage has the right at all times to examine and check all property intended to be mortgaged hereunder. [98]

This mortgage is given as security for the payment to the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the city of Helena, State of Montana, of the sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars now loaned to the mortgagor, according to the terms of mortgagor's promissory note, bearing even date herewith, payable to the order of the mortgagee, and described as follows: one note for \$19,270.00, payable July 1, 1935 after date, said note being for value received, and to bear interest at the rate of six and one-half per cent ($6\frac{1}{2}\%$) per annum from date until paid, interest payable at maturity.

The makers, endorsers and guarantors of said note severally agree to pay an attorney fee in case payments shall not be made at maturity and the makers, endorsers and guarantors of said note severally waive presentment for payment, demand, protest, and notice of non-payment thereof and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them. The endorsers and guarantors also severally consent to any extension of time and substitution of collateral.

This Mortgage is also security for such further and additional sums of money as may from time to time, during the life of this instrument, but only at the discretion of the mortgagee, be advanced and loaned by said mortgagee or assigns, to said mortgagor, together with interest thereon at the rate above specified, which said future advances are now in contemplation and when made, are to be as fully secured hereby, as though the same were specifically described and set forth herein, but for no greater additional amount, however, than Seventeen Thousand (\$17,000.00) Dollars. Mortgagor agrees on demand to execute note payable to said mortgagee or assigns evidencing such additional service.

And This Mortgage shall be void if such payment be made.

But in Case Default Be Made in payment of the principle or interest as provided in said promissory note (or any thereof) then the said mortgagee,

its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns. The sale under the said power of sale shall be advertised by notice posted in five (5) public places in said County, one of which shall be posted at the designated place of sale at least five days prior to such sale, giving the time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

It Is Further Agreed, That the said mortgagor, successors or assigns, shall have the right to remain in possession of the above described property until default be made herein by said mortgagor, provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note or if, prior to the maturity of said indebtedness, said described property, or any part thereof, shall be attached, seized

or levied upon, by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons as creditors, or for taxes, or otherwise, or in any manner, or if the said mortgagor or any other person or persons, shall remove, or attempt to remove, said property, or any part thereof from the said county, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note then and in such event, or in either of such events the said mortgagee, its agent or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof, may be found, and may at its option, proceed and sell such property in the manner and to the purchaser as above provided, and all expenses paid and incurred by the mortgagee in so doing, together with interest thereon at the rate specified in the note above described shall be considered secured by this mortgage and shall be a lien on said property; and said mortgagee may, at its

option, proceed to sell such property, as above provided, and hold the proceeds of sale as security for the payment of said note. The exhibition of this mortgage, or a copy thereof, shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

It Is Further Agreed, in the event that this mortgage covers a crop, either cereal, roots or otherwise, either sown, planted or growing, or to be sown, planted or grown, or covers sheep or goats, that when the said crop hereby mortgaged is gathered, harvested or when the sheep or goats shall be clipped or shorn, the said mortgagee or its assigns shall be entitled to the immediate possession of such crop or clip, and the said mortgagee or its assigns, shall have the right to harvest, thresh, or in the event it be sheep or goats, clip or shear the same, and transport and haul such crop or clip from premises where the same have been grown and to sell and dispose of the same for the market price obtainable therefor; and that the cost and expense of such harvesting, threshing or clipping or shearing of animals, as the case may be, and of the hauling and transporting such products shall be borne and paid by said mortgagor and shall be covered by the lien of this mortgage; and that until such property is so sold and dis-

posed of by said mortgagee or its assigns the lien of this mortgage upon such property, wherever the same may be, shall continue and remain in full force and effect, it being agreed that any moneys received by the said mortgagee or its assigns upon the sale of such property, less the amount secured by these presents, shall be returned to said mortgagor, heirs or assigns. [981½]

In the event that cattle, if any, described or included herein are examined and found to be infected with Bang's disease, and sold in accordance with contract heretofore or hereafter entered into with the Secretary of Agriculture or of any state, municipality or other authority, or either or any of them, for the purpose of eradicating Bang's disease in cattle, the mortgagor covenants to notify the mortgagee immediately of the number of cattle infected and to be sold, and to remit any payments accruing to him from such cattle to the mortgagee to be applied to the reduction of the loss hereby derived; provided, however, that if the mortgagor and the mortgagee shall so agree, the mortgagor may be permitted to purchase, with the indemnity payment so received, sound cattle of same type, grade and approximate value as the cattle so sold, with the understanding that the cattle so to be purchased shall be subject to inspection and approval of the mortgagee or its agent; and that said cattle, shall, upon purchase being consummated, immediately be and become a

part of the security for the loan, or loans, hereby secured and in substitution of the cattle condemned and sold; the mortgage covenanting that he will execute any and all further instruments which may be necessary to effectuate this agreement. The mortgagee may, in his own discretion, make additionally available to the borrower for the purpose of replacement of cattle as hereinabove set forth, any funds which may be received from the sale of the diseased cattle when sold in the open market. In the event any mortgagor fails to account to the mortgagee for all of the amounts paid or received as indemnity and market sale price for cattle so condemned and sold or in any wise fails or neglects to keep and perform any of the agreements or covenants set forth hereinabove with respect to inspection, condemnation or sale of cattle infected with Bang's disease, then and in that event, at the discretion of the mortgagee, such failure or neglect on the part of the mortgagor shall constitute default under the provisions of this mortgage, and the mortgagee shall thereupon, at its option, be entitled to exercise all the rights which it would be entitled to enforce on a default under the terms of this mortgage. [99]

The Mortgagor hereby declares, warrants and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and warrants that the same is free and clear of all

liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

It Is Further Agreed, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

The giving of this mortgage is not intended, and shall not be construed, as waving, releasing or relinquishing any mortgages, liens or other security, if any, which may have heretofore been given to this mortgagee as security to the indebtedness, or any part thereof, herein described, but this mortgage is given as additional security for such indebtedness.

In Witness Whereof, the said mortgagor has hereunto set his hand and seal, the day and year in this instrument first above written.

[Seal]

SIMON DOUGLAS

State of Montana, County of Fergus—ss.

On this 28th day of December in the year 1934, before the undersigned, a Notary Public for the State of Montana, personally appeared Simon T. Douglas known to me to be the person (s) whose name (s) is (are) subscribed to the within instrument, and acknowledged to me that he (they) executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

C. M. KELLY

Notary Public for the State of Montana, residing at Lewistown, Montana. My Commission expires December 13, 1936

[Seal]

State of Montana, County of Lewis and Clark—ss.

M. L. Lewis being first duly sworn deposes and says: That he is an officer, agent, attorney or other representative of Regional Agricultural Credit Corporation of Spokane, Washington, the corporation named in the foregoing mortgage as mortgagee, viz.: its Agent and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

M. L. LEWIS

Subscribed and sworn to before me this 19th day of December, 1934.

N. C. BROWN

Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires August 6, 1935

The undersigned mortgagor (s), described in the above mortgage, does (do) hereby acknowledge receipt of a correct and exact copy of such mortgage

with acknowledgements shown thereon surrendered to me (or us) without cost at the time of its execution.

SIMON DOUGLAS

Endorsement: Filed for record in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M. of said day, records of said county.

[100]

Thereafter, on January 11, 1940, a Stipulation for trial without jury, etc., was duly filed herein, being in the words and figures following, to-wit:

[101]

[Title of District Court and Cause.]

STIPULATION

The parties to the above entitled case hereby stipulate as follows:

1. That the above entitled case may be tried without the intervention of a jury.

2. That the setting of the above entitled case for trial by jury for December 27, 1939 may be vacated.

3. That subject to the approval of the court the rules of civil procedure for the District Courts of the United States shall be applicable to all further proceedings in this case.

4. That the contention set forth in the amended reply to the effect that the renewal mortgage dated December 19, 1934 had become effective and had

made non-effective the original mortgage dated December 27, 1933 is abandoned.

Dated December 19, 1939.

H. LEONARD DE KALB
RAYMOND E. DOCKERY

Attorneys for Plaintiff

W. Q. VAN COTT
D. EUGENE LIVINGSTON
J. R. WINE

Attorneys for Defendant

[Endorsed]: Filed Jan. 11, 1940.

C. R. GARLOW, Clerk. [102]

Thereafter, on May 28, 1940, a Transcript of Evidence and Proceedings at Trial was duly filed herein, being in the words and figures following, to wit: [103]

[Title of District Court and Cause.]

Present: Hon. Chas. N. Pray, Judge (Without a Jury).

H. LEONARD DeKALB, Esq., and
RAYMOND E. DOCKERY, Esq.,

Attorneys for Plaintiff,

W. Q. VAN COTT, Esq.,
D. EUGENE LIVINGSTON, Esq., and
J. R. WINE, Esq.,

Attorneys for Defendant.

* * * * *

The above entitled cause coming on for hearing before the Hon. Chas. N. Pray, Judge presiding,

sitting without a jury, on February 20, 1940, and the above named Counsel being present, the following proceedings were had and done: [106]

The Court: Gentlemen, are you ready for trial in Chapman vs. Regional Agricultural Credit Corporation?

Mr. DeKalb. We are.

Mr. Van Cott: Yes, your Honor.

The Court: I understand there was a stipulation to shorten the hearing considerably.

Mr. Wine: If the Court please, I would like to call the Court's attention to this Stipulation. There are four sections of this Stipulation.

Paragraph One, they stipulate that the above entitled case may be tried without the intervention of a jury.

Paragraph Two, that the setting of the above entitled case for trial by jury for December 27, 1939 may be vacated.

Paragraph Three, that subject to the approval of the Court the rules of civil procedure for the District Courts of the United States shall be applicable to all further proceedings in this case.

Paragraph Four, that the contention set forth in the Amended Reply to the effect that the renewal mortgage dated December 19, 1934 had become effective and had made non-effective the original mortgage dated December 27, 1933 is abandoned.

By this I take it only the parties may enter into it, which requires the Court's approval, and I submit that now, the third paragraph, and we proceed under that paragraph.

The Court: Very well, the Court will approve it.

Mr. Wine: In this connection, we filed in this case a plea in abatement. We now wish to withdraw that [107] plea and it may be stricken.

The Court: Very well; that leaves the case at issue so you are prepared to proceed with the trial?

Mr. Wine: Yes, your Honor.

Mr. DeKalb: May it please the Court, would you like to hear a very brief statement?

The Court: Yes, I think that would be in order right now.

(Whereupon Judge DeKalb made a brief outline of the case to the Court)

The Court: Very well, call your first witness.

HAL CLEMENT

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. You may state your name?

A. Hal Clement.

Q. Where do you reside?

A. Lewistown, Montana.

Q. How long have you lived there?

A. About seven years.

Q. What, if any, experience have you ever had with livestock, particularly sheep?

A. Well, I was practically raised on a sheep ranch, and later was an Inspector for the Production Credit Association of Spokane.

(Testimony of Hal Clement.)

Q. And having been raised on a ranch, let me ask you if you are familiar with the values of hay equipment, hay, oil cake, food for livestock, the necessary camp equipment that is usually used and employed in connection with handling sheep?

A. I would think so, with some limitations, if I may state those limitations. [108]

Q. Yes.

A. Any one ranching is not familiar and up to date with current prices on all occasions.

Q. No, that is true. Let me ask you if you know, and I will refer to it briefly, I will call this bunch of sheep the Douglas sheep. Let me ask you if you were familiar with the band of sheep known as the Douglas sheep that were ranged I think at the time of the sale in the Armells country?

A. I made an inspection of the Douglas sheep for the Production Credit Association in response to an application.

Q. You were at that time employed by them?

A. I was.

Q. And the record here shows that those sheep were sold under chattel mortgage on the fifth day of February, 1935. About how long before the sale of those sheep was your inspection made?

A. To the best of my recollection my inspection was made on or about the twenty-ninth. As I remember I made several trips out there. It has been so long since I don't know whether the formal inspection was made the second or third trip.

(Testimony of Hal Clement.)

Q. You think about the twenty-ninth of January?

A. Yes, that would not be far away from the actual time.

Q. The sale was held on the fifth. Were you at that time familiar with the values, call it market values, or what, of sheep of the character of this band of sheep in that vicinity at that time, were you?

A. I believe I was. I was supposed to be, at least.

Q. And, let me ask you Mr. Clement to give to the Court your [109] opinion as to the value of that band of sheep, enumerating them by sexes and age, etc., if you will do so, please?

Mr. Wine: For the purpose of the record, we object to any evidence of value with reference to the personal property referred to in the Amended Complaint and pleadings in this case upon the ground it is immaterial, irrelevant and incompetent to any issue involved in this case.

The Court: Overrule objection. Proceed.

Q. And if you need to do so, and have the memorandum which you made yourself, or a true copy of one you made yourself, if you need to refer to it, you may refer to that, but if you can testify from memory, let's have it?

A. Possibly I should state that I have refreshed my recollection from notes made at approximately that time. Using that as a basis, I will state that I

(Testimony of Hal Clement.)

value the sheep this way: Yearling ewes, \$6.50. This is per head basis. Two year old ewes, \$7.50; Three year old ewes, \$6.50; Four year old ewes, \$5.00; Five year old ewes, \$4.00, and sixes and over, \$3.00. There were some ewe lambs in there that I appraised at \$5.50, and some mixed lambs that were appraised at \$3.00; also some bucks at \$15.00.

Q. Now, in addition to the sheep, using that for a basis of the lambs and all, in addition to the sheep there were other equipment which is enumerated, the character of which is not in issue here, that was covered by the chattel mortgage, consisting of lambing tents, tepees, hay, oil cake and matters of that kind. Did you place a value upon that at that time, or do you have an opinion at this time as to its value? [110]

A. I didn't place a valuation on it, and I don't have any idea what the value was on that equipment.

Q. Would you say it did have some value in addition to the value of the sheep?

A. I can say there was some intrinsic value to the property.

Q. Do you know some of it was sold, if not all of it was sold at the sale?

A. Not as a matter of fact because I was not at the sale.

Q. That is a matter of hearsay with you, I take it. Now, do I understand you as expressing your opinion that at that time, at the time of your in-

(Testimony of Hal Clement.)

spection, on or about the twenty-ninth of January, your opinion as to values were as you have stated them?

A. Yes, those are the values I put on my report, and naturally those are the values I place on them.

Cross Examination

By Mr. Van Cott:

Q. Mr. Clement, the document to which you have referred to refresh your recollection in regard to values, was the appraisal that you made at the Simon Douglas outfit for the purpose of being considered by the Production Credit Association in regard to a loan, is that true? A. That is right.

Q. The valuation you placed on them, and to which you have referred, was solely for that purpose? A. That is right.

Q. The opinion you have expressed here in regard to values is based solely upon the recollection you recorded in that document?

A. Yes sir.

Q. Isn't it a fact that there is considerable difference in [111] an appraisement for a production loan as compared with a cash value?

A. Well, now I have never made an appraisement for cash value. Production credit loans are made on a production basis.

Q. On a much more liberal basis than the cash appraisal?

(Testimony of Hal Clement.)

A. I am not in a position to say. I never made a cash appraisal.

Q. You never made a cash appraisal?

A. No sir, not for a sale.

Q. Isn't it a fact also that in making those appraisals for the purpose of a loan by the P. C. A. that you go according to a schedule of prices?

A. I never did. I use my own judgment. That is what we were supposed to do.

Q. You don't undertake to say or to express the opinion that these sheep on February fifth, 1935 could have been sold on a cash basis at the figures you have stated?

A. Will you repeat that?

Q. Read the question (question read)?

A. I don't attempt to make any statement as to that. I merely made the statement as to my appraisal prior to the sale.

Q. You are not undertaking to express any opinion what they could have been sold for on a cash basis on that date? A. No, I am not.

Redirect Examination

By Mr. DeKalb:

Q. You have placed this as the value of those sheep at that time?

Mr. Van Cott: That is objected to as leading?

[112]

The Court: It may be leading.

Mr. DeKalb: That is all.

Witness Excused.

GEORGE YEAGER

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. You may state your name, please?

A. George Yeager.

Q. Where do you reside?

A. Armells at the present time.

Q. That is in Fergus County?

A. Yes sir.

Q. What is your occupation?

A. Livestock business.

Q. How long have you been engaged in the livestock business? A. All my life.

Q. That doesn't mean so much unless we know about your age. What is your age?

A. Forty-five.

Q. That would mean all your matured life?

A. Yes sir.

Q. You grew up, I take it, on a stock ranch?

A. Yes sir.

Q. Did you know the band of so-called Douglas sheep that were the subject of a chattel mortgage sale that took place on the fifth of February, 1935, are you familiar with this sheep?

A. Yes sir.

Q. May I ask you, if in your occupation as a livestock man you were acquainted and familiar with the values, market or otherwise, values of live-

(Testimony of George Yeager.)

stock of the character of the Douglas sheep at that time? A. Yes sir. [113]

Q. You know of the death of Simon Douglas, occurring in December I think, 1934, and the sale that took place on the fifth of February, 1935. Let me ask you if you were interested in acquiring any of those sheep, speaking of it in a sense as embracing lambs ewes and wethers, etc., were you interested at that time in purchasing at this sale any of these sheep?

A. I was interested in buying the whole bunch.

Q. What, if any, investigation, specific investigation did you make, and examination, of this band of sheep with the idea in mind of becoming interested in purchasing the whole spread?

A. Well, I went out there twice and looked at them.

Q. Did you examine them sufficiently to determine in your own mind——?

A. Yes, I did.

Q. And to enable you to now express an opinion as to the value of those sheep at that time?

A. Yes sir.

Q. Let me ask you, what in your opinion, either splitting them up by putting a price on the ewes of different ages, on the wethers, and on the bucks, and on the younger ewes, do it as you like, split them up, or not, what is your opinion as to the value of those sheep at that time on or about the fifth day of February, 1935?

(Testimony of George Yeager.)

A. About twenty thousand dollars.

Q. And you didn't purchase any of them, did you, at the sale? A. No, I did not.

Q. You might state to the Court briefly just why you did not?

A. Well, I had a deal with the Production Credit Association and I got turned down. [114]

Q. As I understand it, you were endeavoring to finance yourself so as to enable you to have the money with which to make the purchase, under your judgment as to values? A. Yes sir.

Q. And that failed you, did it?

A. Yes sir.

Q. Now, in addition, having been brought up on a stock ranch, let me ask you in addition to these sheep you have knowledge and acquaintance with values of farm machinery, hay tools, hay, oil cake, horses, and other things which I won't take time to enumerate but which were offered at that sale and sold at that sale in addition to the sheep called camp equipment, are you familiar with them?

A. Yes sir.

Q. What in your opinion was the value of that?

A. Well, if I remember right, I believe I valued the machinery and the camp supplies at a thousand dollars.

Q. Was that your opinion of the value at that time?

A. I think that is what it was, yes.

(Testimony of George Yeager.)

Q. That would be your judgment on it at this time, on the values as they existed then, that is your judgment of the value? A. Yes.

Q. Did you include the horses in that valuation of the equipment? A. No, I did not.

Q. What value would you place upon them?

A. Well, I didn't see the horses.

Q. You didn't see them? A. No.

Q. You would not care to place any value on the horses?

A. No, I didn't see the horses.

Cross Examination

By Mr. Van Cott:

Q. You stated that you placed a valuation of Twenty Thousand [115] Dollars. Do I understand that to be on the entire outfit?

A. No, that was for the sheep and machinery and the oil cake and the hay.

Q. That is, the livestock, the horses, machinery, oil cake and hay?

A. No, not the horses.

Q. Not the horses? A. No.

Q. Everything in the outfit except the horses?

A. Machinery and camp supplies and the hay and oil cake and the sheep.

Q. That is everything in the outfit except the horses?

A. Well, I don't know if there was anything else, or not. I couldn't tell you if there was any household goods, or not.

(Testimony of George Yeager.)

Q. Now, the place where you and your brothers live and operate a farm is in the same vicinity as where the Simon Douglas outfit was, is that true?

A. No.

Q. Where is it?

A. Our home place is near Glengarry.

Q. How far away is that?

A. Nine miles west of Lewistown.

Q. How many miles away from where the Simon Douglas outfit was?

A. Probably forty-five miles.

Q. What kind of a unit do you operate there?

A. Oh, it is wheat, cattle, horses.

Q. Any sheep?

A. Not under the name of Yeager Brothers.

Q. Well, under any name?

A. Yes, just George Yeager only; just under myself. I am [116]the only one running sheep.

Q. You run sheep over there? A. Yes sir.

Q. How many? A. Three thousand.

Q. At that time you were figuring on buying this outfit, the Simon Douglas outfit, you had feed for the Simon Douglas sheep, did you?

A. There is feed there.

Q. Where? A. On the horse ranch.

Q. On the Simon Douglas horse ranch?

A. Yes sir.

Q. When you call that the Simon Douglas horse ranch, it was not ever owned by him, was it?

A. No, he just had a lease on it.

(Testimony of George Yeager.)

Q. In order to operate in that locality you were dependent upon the whim of the lessor, were you not?

The Court: He would be depending upon the length of the lease.

Q. How long a lease did Douglas have on the horse ranch?

A. It ran until the first of May.

Q. Whether you would get the lease next season would depend whether you could make a deal with the lessor?

A. I would not be afraid I could not get another lease on it.

Q. Well, you had it to do, didn't you?

A. Yes sir.

Q. If your deal went through you were willing to borrow from the P. C. A. approximately Twenty Thousand Dollars for the purpose of making that deal, is that correct?

A. No, it would not run quite that high?

Q. How much was it, about Nineteen Thousand Dollars?

A. I think it was Nineteen Thousand with the stock, with the five per cent stock. [117]

Q. The deal was to borrow enough money to pay off the loan that was owing to the Regional Agricultural Credit Corporation of Spokane and to buy the five per cent stock that was necessary to be bought in order to get a loan from the P. C. A., is that right?

A. Yes sir.

(Testimony of George Yeager.)

Q. When you placed this valuation of Twenty Thousand Dollars on that outfit, that is what you mean you were willing to borrow that much money in order to take the outfit over?

A. No, I figured it was worth that and I thought it was a good buy.

Q. You were willing to borrow that much money and take over the outfit?

A. I never asked for that much money?

Q. What you really mean is, you considered the property was worth that much in cash?

A. Well, I was just buying it on a production basis.

Q. You were willing to borrow that?

A. I was going to buy on the run.

Q. Were you not going to put up any cash?

A. Yes.

Q. How much. A. Two thousand dollars.

Q. Was that your cash or somebody else' cash?

A. Well, it was somebody else'.

Q. You were going to borrow it from somebody else? A. Yes sir.

Q. All the money you were going to put into that was borrowed money?

A. No, I was putting in my equity in 1100 sheep besides. I had eleven or twelve hundred sheep besides that and I was figuring putting that in the pot too. [118]

(Testimony of George Yeager.)

Q. How much would your equity in those sheep

amount to?

A. Probably four thousand dollars.

Q. Going back to that lease, do you know that the lessor raised the rent on Douglas fifty per cent just the year before?

Mr. DeKalb: We object to that. It is outside the issues and not proper cross-examination.

The Court: I suppose he knew what the rental was because he was contemplating buying the outfit. He may state, if he knows.

Q. Did you know that?

A. I didn't know they had raised the rent.

Q. You didn't know the rent formerly had been twelve hundred dollars a season and the landlord demanded an increase of fifty per cent?

The Court: He said he didn't know. He has already answered the question.

Q. Were you present at the sale?

A. No, I was not.

Q. When did you last see the sheep prior to the sale?

A. I couldn't tell you but I think about three or four days before the sale.

Q. Can you tell the Court the description of the sheep that you say you placed the value on,—how many lambs?

A. I don't remember. There was around nineteen to two thousand head.

Q. Two thousand head?

A. I think so, yes.

(Testimony of George Yeager.)

Q. This valuation that you have given includes some two thousand head of lambs?

A. Yes sir.

Q. What next does it include? [119]

A. There was around eleven hundred three year old ewes.

A. There was around eleven hundred three year old ewes? A. I think so.

Q. Eleven hundred? A. Yes sir.

Q. What else?

A. Well, there was an older band there but I don't know how many was in that, I don't remember.

Q. You can't tell the Court what you place this valuation on?

A. I don't know how many head was in that band.

Q. I am asking you what the items are upon which you place the valuation of Twenty Thousand Dollars. Were there any yearlings?

A. I don't think so.

Q. No yearlings. Were there any two year olds?

A. I don't remember.

Q. You don't know whether there were any twos. You stated there were eleven hundred threes?

A. I think there was eleven hundred and eighty, I don't remember.

Q. How about fours?

A. Well, I couldn't tell you how many.

(Testimony of George Yeager.)

Q. You don't know whether there were any fours, or not? How many ewes over fours?

A. There was probably nine hundred of them. I don't remember how many there was in that band.

Q. What you call aged?

A. I think I would call them aged ewes, yes.

Q. How many bucks?

A. I don't remember.

Q. You don't know anything about the bucks. So this valuation, so far as the sheep are concerned, is based on two thousand lambs, eleven hundred three year old ewes, and [120] nine hundred to a thousand ewes over four years old, and nothing else?

A. And a carload of oil cake and hay.

Q. And that is all?

A. And the machinery.

Q. Anything else?

A. Not in this deal I was working up, no.

Q. What was the condition of those sheep?

A. Well, I would say they were in good winter condition.

Q. What have you to say as to the condition of their wool? A. It was all right.

Q. Had the ewes been bred? A. Yes.

Q. Well bred?

A. Well, I would say they was. Of course, the bucks were still running with them. The bucks were still running with the ewes.

(Testimony of George Yeager.)

Re-Direct Examination

By Mr. DeKalb:

Q. You haven't difficulty in recalling the details of this band, approximately how many sheep, using it in that sense, including lambs and everything, was in this band? A. Which band?

Q. In the Douglas band, the whole bunch?

A. Oh, probably forty-one or forty-two hundred.

Q. You had appraised them with the idea of acquiring them, if you could get the money?

A. Yes sir.

Q. And you placed those values upon them, and it has remained a matter of your memory?

A. Yes sir.

Q. You were familiar with values there at that time? A. Yes sir.

Witness Excused. [121]

FRANK BIRKINBINE

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. You may state your name, please?

A. Frank Birkinbine.

Q. Where do you reside?

(Testimony of Frank Birkinbine.)

A. Great Falls.

Q. What is your occupation?

A. Stock buyer.

Q. That includes I take it all types of livestock?

A. Yes sir.

Q. Sheep, etc? A. Yes sir.

Q. How long have been engaged in that occupation?

A. Ever since I was eighteen or twenty years old.

Q. And your age at the present time is what?

A. Forty-eight.

Q. May I ask you if you had anything to do along in the early days of February, 1935 with any of the sheep that had been acquired from the Douglas chattel mortgage sale? A. I did.

Q. How many sheep and what character of sheep did you have to do with that had been acquired at that sale?

A. Well, I bought what is called aged sheep. I think the number in that band, about a thousand head of aged sheep.

Q. Were those mouthed?

A. Yes, they were.

Q. Were there any broken-mouthed or split-mouthed sheep? A. Yes, there were.

Q. What would you say the percentage was?

A. Well, that is five years ago and I couldn't say exactly but based on my memory there was around better than a carload; better than two hun-

(Testimony of Frank Birkinbine.)

dred and fifty of them that were broken-mouthed.

[122]

Q. How many were acquired at that time you were interested in?

A. About a thousand head, may be a little more.

Q. How many of those were young?

A. Not any of them were really young. They were what you call graded and were broken and solid, the mouthed ones, that is, those five, six and seven years old.

Q. Taking those of that character at that time, may I ask you if you were familiar with values of sheep of that character in that vicinity at that time?

A. Yes sir.

Q. In your opinion what was the value per head of that bunch of sheep that had been so acquired at the Douglas sale?

A. I am pretty positive that I sold the solid mouthed of those at four dollars a head. I think that was a little high on them. I remember I had to sell them, I had to transport them from one town to another before I could dispose of the sheep but I did finally dispose of them.

Q. That was the broken-mouthed?

A. That was the solid mouthed.

Q. What did you dispose the broken-mouthed at?

A. I think right at two dollars.

Q. The younger stuff?

A. The younger stuff I didn't handle.

Q. Having been acquainted with those sheep

(Testimony of Frank Birkinbine.)

that were acquired, what value would you place on the younger stuff, based upon your knowledge of market conditions?

A. You know, what price I put on the sheep was the selling price. I have not checked that price offered me, my estimate of the value of the sheep, but if the solid mouthed was [123] selling at that time at four dollars, a younger one on that same basis would be worth right at seven dollars a yearling or twos and then your depreciation as they grow older.

Q. Would that be your opinion of the value of the young ones at that time?

A. Yes sir. You understand there is an expense in handling sheep, and we have to make a profit?

Q. That is usually ten cents a head?

A. We can't handle them and take a chance and pay for them at ten cents a head. The standard rule on a thousand is ten cents but some people get twenty-five cents.

Q. Those values are values that are or were current in the trade at that time?

A. Yes, what we were selling and trading sheep at.

Q. That is the value you placed upon them at that time? A. Yes sir.

Q. In the case of young sheep, how far up the scale did you go? A. Three year old ewe.

Q. You have already told us the number of old and the number of young in this band that you were interested in? A. Yes sir.

(Testimony of Frank Birkinbine.)

Q. Now, do I understand there were 1085 of the old ewes containing some broken-mouthed, and how many of the young? To refresh your recollection, was there not 1283 I think of the young ewes?

Mr. Van Cott: I object to that, if the Court please, as mis-stating the witness's evidence, and as being leading.

The Court: You may inquire whether or not there [124] was not that number. Let him answer the question. Overrule.

A. I am not prepared to say. I didn't handle or have anything to do with young ewes. There was a band of them around that figure. There were no young ewes in the sheep I bought and sold and handled.

Q. Did you handle any of the young sheep acquired over there at the sale by Lingshire?

A. I didn't handle any of the young sheep, no.

Cross Examination

By Mr. Van Cott:

Q. With whom did you deal on the purchase of sheep you have testified?

A. Johnson and Nepstad.

Q. Daily Johnson and O. A. Nepstad?

A. Yes sir.

Q. Where did you deal with them?

A. In Lewistown.

Q. On what date was it, if you know?

A. Well, now, it was the next day or the day after that of the sale.

(Testimony of Frank Birkinbine.)

Q. It was some time early in February, 1935?

A. Yes, right at the time of the sale.

Q. Exactly, what was the deal you made with them?

A. I bought this band of sheep, according to grade.

Q. What was the grade?

A. Solid-mouth and broken-mouths.

Q. You say there were about two hundred and fifty broken-mouthed? A. Right at that.

Q. About seven hundred and fifty solid-mouthed? A. Right at that.

Q. Are you able to inform the Court as to the ages of the sheep? A. No. [125]

Q. They may have been old?

A. They were old sheep. After a sheep gets four years old you can't tell the age.

Q. What was the deal you made with Daily Johnson and O. A. Nepstad? A. The deal?

Q. Yes.

A. I was to pay them a certain price.

Q. What was that price?

A. I am not sure of the price I arranged with Johnson.

Q. You are unable to inform the Court?

A. I know what we sold them for.

Q. Where did you sell them?

A. In Iowa.

Q. You didn't sell them in Montana?

A. No sir.

(Testimony of Frank Birkinbine.)

Q. You couldn't tell the Court anything about what you paid for them in Montana?

A. I could not.

Witness Excused.

JOE C. KING

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. State your name, please.

A. Joe C. King.

Q. Where do you reside?

A. Lewistown, Montana.

Q. How long have you resided there?

A. I was born there.

Q. What familiarity have you with livestock?

A. Well, I was born on a livestock ranch, and have been around it all my life.

Q. Did the livestock include sheep?

A. Yes sir.

Q. Let me ask you if you are still engaged in ranching, [126] livestock ranching or other-wise?

A. Yes, I am running sheep, and I also deal in sheep.

Q. How long have you been a dealer in sheep?

A. Off and on for the last seven or eight years.

(Testimony of Joe C. King.)

Q. You were so dealing in sheep in 1935, were you? A. Yes sir.

Q. Let me ask you if you knew a band of sheep known as the Douglas sheep which were sold at the chattel mortgage sale on the fifth of February, 1935? A. I saw them prior to the sale.

Q. Do you know anything about the equipment and supplies which were on hand such as hay and oil cake and oats, etc.? A. I do not.

Q. Do you know whether there was any of that?

A. I naturally assume there was but I didn't pay any attention to that.

Q. About how long before the sale that took place on the fifth day of February, 1935 did you examine the sheep?

A. Well, I would say it was some time the latter part of January, some time between the fifteenth and twenty-fifth; I can't definitely remember.

Q. When you made an inspection of those sheep at that time did you have any object in mind of acquiring any of them for yourself?

A. I had an eastern order for some of them.

Q. You did? A. Yes sir.

Q. Some one who purported to know about the sheep, somebody that knew?

A. No, I told this party these sheep would be offered for sale and he wanted me to see them.

[127]

Q. When you saw this bunch of sheep were you interested in any particular the age or sex or kind of sheep?

(Testimony of Joe C. King.)

A. My order called for a good mouthed ewe and I went out to inspect them for condition.

Q. You saw their condition? A. Yes sir.

Q. Without mouthing them?

A. Yes, that is right.

Q. Were you in the court room and heard Mr. Birkinbine testify about the percentage of broken-mouths there were? A. I did.

Q. Were the ewes that you were interested in sound-mouthed, old mouthed?

A. They were good mouthed ewes.

Q. Good mouthed, were you able to place a value on those?

A. My client was willing to pay five dollars a head for good mouthed ewes.

Mr. Van Cott: I move to strike the answer as not responsive to the question.

The Court: We will let it stand for what it is worth.

Q. Would that be your opinion at the time of the value of the sound ewes?

Mr. Van Cott: I object to that as leading.

Mr. DeKalb: Withdraw the question.

Q. What would be your opinion as to the value, the reasonable value placed upon them at that time?

A. I figure any one that bought those sheep for that price would make some money on them.

Mr. Van Cott: I move to strike the answer as not responsive.

The Court: Sustain. [128]

(Testimony of Joe C. King.)

Q. Let us have your opinion. Would it be your opinion that would be the value, or what?

A. My opinion is that is the value of those sheep.

Q. Where do you draw the line between the expression, old ewes and young ewes?

A. We call a young ewe up until she is to and including a three year old.

Q. Is there usually any basis when you know the value of one age and one sex of sheep? There is usually some index by which that knowledge is fixed as to the knowledge of other values of other types of sheep, lambs, etc.?

A. Well, in my opinion a young ewe is worth from one dollar to three dollars a head more than a broken-mouthed ewe. A broken-mouthed is worth less than full-mouth ewe.

Q. You would say that was in line with current values there at that time, would you?

A. Yes sir.

Q. What age usually does this condition of broken-mouthed ewes come in?

A. That depends on the range conditions.

Q. Do I understand that placing a value of five dollars on the sound-mouth ewes gives an index of two to three dollars more than that in value for the young ewes?

A. One to three dollars.

(Testimony of Joe C. King.)

Cross Examination

By Mr. Van Cott:

Q. That is, as I understand you, there is a differential between what you call young ewes and what you call old ewes of one to three dollars, is that correct?

A. No, I didn't say anything about old ewes. I spoke about good mouths and broken-mouths. [129]

Q. You would say there is a difference between broken-mouth ewes and sound mouth ewes?

A. Yes, up to one to three dollars, that is right.

Q. Ewes may have broken-mouths as early as two or three years old, if they happen to range in certain places, may they not?

A. That is right.

Q. And you may have sound-mouth ewes at seven or eight years old? A. Yes sir.

Q. How long did you spend in that band of sheep before the sale?

A. I just drove around out there.

Q. How long were you out there?

A. It didn't take very long to look at the bunch of sheep.

Q. Well, how long?

A. I would not want to state; I don't remember.

Q. Were you there as long as a half hour?

A. Probably.

Q. Just about that? A. Probably.

(Testimony of Joe C. King.)

Q. Did you get out of your car?

A. I did not.

Q. You didn't mouth a single sheep?

A. I did not.

Q. You didn't count a single sheep?

A. I did not.

Q. The order you say you had was for how many sheep?
A. For solid-mouth.

Q. They had to be solid-mouth?

A. They had to be good mouth.

Q. And what age?

A. I can't tell the age of a good mouth ewe.

Q. I know but what age did your order call for?

A. Good mouth ewes.

Q. Could it have been for old ewes then?

A. Yes. [130]

Q. Or young ewes?
A. That is right.

Q. You were free to offer five dollars a head regardless of age?

A. I probably didn't make myself clear. In other words, after a ewe gets a certain age, and she starts spreading she may have all eight teeth but she is not a good ewe.

Q. You have told the Court a ewe may have a solid mouth at seven or eight years?

A. A solid-mouthed ewe is not necessarily a good mouthed ewe.

Q. Might you find seven year old ewes that are good mouthed?
A. No.

(Testimony of Joe C. King.)

Q. How old might they be and still be good mouthed?

A. I would say five years would be the oldest.

Q. According to your testimony, as I understand it, this order might be filled by buying a thousand five year old ewes, if their mouths were good?

A. That is right.

Q. Isn't it a fact, that during the fall of 1934 the Government drouth winter program was on and that thousands and thousands of sheep were sold to the Government for Two Dollars a head?

A. That is right.

Q. I mean five year old good mouthed ewes, don't you know that to be a fact?

A. Yes sir. May I ask you a question?

Q. I am not on the witness stand.

A. O. K.

Q. What had happened, if anything, since the fall of 1934 to up the price of five year old ewes from two dollars to any amount?

A. There was the wintering expense on those ewes up to February. That put an additional valuation on them, and they were closer to shearing and lambing. [131]

Q. How much additional was put on the five year old ewes on account of wintering and prospective breeding and lambing?

A. Two or three dollars.

Q. How much?

(Testimony of Joe C. King.)

A. Over and above your Government two dollar price I am speaking of.

Q. You told the Court the market value of five year old ewes in Fergus County in February, 1935 was five dollars a head, did you not?

A. It was my market value for a thousand head.

Q. Well, you had an order for that?

A. Yes.

Q. You would not say that is the market value?

A. There was a market for that many ewes, and that was the market value on that many head.

Q. Where did the order come from?

A. From Iowa.

Q. Laying that aside, did you have an opinion as to the market value of five year old ewes in Fergus County in Montana in February, 1935?

A. I did not.

Q. You didn't have any opinion?

A. I have an opinion in this way. I had a market for that many at that price.

Q. I am asking you if you had any opinion as to the market value of five year old ewes at that time and place?

A. At what time and place?

Q. February, 1935, Fergus County, Montana?

A. I still don't understand your question.

Q. Did you have any opinion as to the market value of five year old good mouthed ewes in Fergus County, Montana in February, 1935?

(Testimony of Joe C. King.)

A. That depends on how many you wanted to sell all at once. [132] I had an opinion on a thousand head.

Q. The opinion you had on the thousand head was based on the fact that somebody gave you an order from Iowa? A. Yes sir.

Q. Have you aside from that any opinion as to the market value of that class of ewes at that time and place?

A. That is the only opinion I could have, what I could get for them.

Q. Is your answer—no, you had no opinion?

The Court: He has answered your question.

Q. Have you any opinion?

The Court: That is his opinion as to the market value, what you would get for them at that time, that character of sheep.

Q. You didn't attend the sale?

A. I did not.

Q. You didn't make any bid at the sale through any agent? A. I did not.

Q. You were how many miles away from the sale?

A. I was in Lewistown. I don't know how many miles that is exactly.

Q. You have been in the sheep business as you say for many years. Are you familiar with a rule of thumb method that sheep men have of placing values upon ewes by reference to the price of lambs?

(Testimony of Joe C. King.)

A. I generally figure a yearling ewe in the fall is per head what a lamb is worth per pound, a ewe lamb.

Q. In other words, if in the fall the price of lambs we will say is four cents a pound, then you consider that the market value of a yearling ewe would be four dollars a head? [133]

A. Roughly, yes. There is a difference in quality, of course.

Q. Would that be true of a two year old ewe?

A. I would consider a two year old worth one dollar a head more.

Q. What about a three year old?

A. A three,—she is worth about the same as a yearling.

Q. How about a four year old and over?

A. The price scales down there.

Q. To about half the value of a yearling, is that right?

A. It depends on how old you want to go.

Q. Well, generally?

A. Yes, they scale down.

Q. Do you know what the market price of lambs in the fall of 1934 was? A. Yes.

Q. What was it?

A. There was not much of a market. Most lambs went out on a feeder contract.

Q. They were selling for about four or four and a half cents a pound, were they not?

A. Yes sir.

(Testimony of Joe C. King.)

Q. Applying your rule of the thumb formula, that would make the market value of yearling ewes in the fall about four or four fifty?

A. Yes sir.

Q. And two year old ewes about five to five fifty?

A. Yes sir.

Q. And three year old ewes four to four fifty?

A. The same price as a yearling.

Q. The price of old ewes about four or four fifty?

A. Uncle Sam bought them at two dollars a head.

Q. All the ewes? A. That is right.

Q. What was the condition of the sheep you saw out there [134]

Q. What are the various classifications for sheep, other than choice, good, fair, poor and very poor, is that about right?

A. Put medium in there.

Q. These you say were fair?

A. Yes sir.

Q. As to flesh? A. Yes sir.

Q. How were they as to wool?

A. They were all right as to wool, so far as I could see; they looked all right.

Q. Had they been bred?

A. I suppose so, yes.

Q. Well, do you know?

A. I don't know, no.

Q. You are unable to tell the Court how many, if any, had been bred which were there in the band?

(Testimony of Joe C. King.)

A. I am not.

Q. You are not able to? A. No.

Q. Would you have to get out and mouth them and count them for that?

A. That is right.

Q. That would have taken you a day or more, would it not? A. Yes sir.

Re-Direct Examination

By Mr. DeKalb:

Q. You can tell approximately from looking at a band of sheep about how many there are, can you not? A. Yes sir.

Q. In regard to the Government price that Mr. Van Cott has mentioned, during the fall of 1934, were those purchases made because of shortage of grass? A. Drouth conditions mostly.

Q. Those that had feed, was there a different price?

A. The Government didn't buy any ewes in counties that had feed. [135]

Q. The Douglas sheep, they were kept on forage and pasture at that time, were they?

A. Yes sir.

Q. I observed once during your cross-examination there was a question you wanted to ask; was it anything you had in mind in connection with the Government purchases? Is there anything you can add in explanation here that will throw light upon this matter?

(Testimony of Joe C. King.)

A. I don't remember what the item was now.

Q. All right. It was developed on cross-examination that you did not attend the sale. For what reason?

A. Well, I happened to be, unfortunately, a witness in an automobile accident case and that case came up that same day and I was subpoenaed in court at Lewistown.

Q. You make a habit of obeying subpoenas, do you?

A. It says something on them that you have to.

Q. The Courts say it has to be done?

A. That is right.

Re-Cross Examination

By Mr. Van Cott:

Q. You couldn't send an agent out to make a bid for you?

A. No, those sheep had to be mouthed as they were bid for sale in the individual bunches, and I wanted to do that on this particular order.

Q. When were you subpoenaed?

A. I don't remember.

Q. With reference to the date of the sale?

A. It was on the same day.

Q. You were subpoenaed that very day?

A. I was subpoenaed that very day.

Q. Except for that you had intended to go to the sale? A. That is right. [136]

(Testimony of Joe C. King.)

Q. How could you have moved that herd of sheep that very day we will say?

A. It would be quite a job.

Q. You couldn't do it, could you?

A. I could have bought them accordingly.

Q. Counsel ask you if you could tell about how many sheep there are in a herd by looking at it, and you said you could, generally. You can't tell anything about their ages by looking at them, can you?

A. Not exactly. You can tell whether they are old or young by looking at them.

Q. You can't tell how many there are by years, can you? A. I should say not.

Re-Direct Examination

By Mr. DeKalb:

Q. About how many, in your opinion, would you say there were in this band you saw there?

A. I would say between eleven and twelve hundred in this band I drove around.

Witness Excused.

Mr. DeKalb: I think that about concludes the evidence the plaintiff will submit on the matter of values. If I am not out of order in suggesting a short recess, we will check our evidence and see if we have anything further.

The Court: Well, it is nearly noon now and we will take a recess until one-thirty.

(Whereupon court adjourned until 1:30 P. M.) [137]

Afternoon Session: 1:30 P. M.

Mr. DeKalb: The plaintiff rests his case in chief.

The Court: Very well.

Mr. Van Cott: Judge DeKalb has been kind enough to agree he would stipulate certain facts. I believe, Judge DeKalb, you will stipulate that the stock of the defendant corporation at the time of the matters referred to in the pleadings in this case was owned by the Government of the United States?

Mr. DeKalb: Yes, we will so stipulate. We rely upon Counsel that it is a provable fact.

Mr. Van Cott: We do make that admission, your Honor. Mark this as an exhibit. The document marked for identification, Defendant's Exhibit "1", is a certified copy of the return of sale, certified to by the County Clerk and Recorder of Fergus County.

Mr. DeKalb: That is like the one exhibited in the Complaint?

Mr. Van Cott: Precisely the same. We offer Exhibit "1" in evidence.

Mr. DeKalb: There is no objection, except as to its relevancy and its materiality; to that, we object.

The Court: Very well, let it be received in evidence.

DEFENDANT'S EXHIBIT 1
NOTICE OF SALE UNDER CHATTEL
MORTGAGE FORECLOSURE

Notice is hereby given that whereas default has occurred in the conditions of that certain chattel mortgage executed by Simon Douglas of Fergus and Petroleum Counties, Montana, Mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, Mortgagee, which said mortgage bears date of 27th day of December, 1933, and was filed in the office of the County Clerk and Recorder of Fergus County, State of Montana, on the 8th day of January, 1934, Number 926240, and also filed in the office of the County Clerk and Recorder of Petroleum County, State of Montana, on the 9th day of January, 1934, Number 7222, by reason of the failure of said mortgagor to pay the debt secured thereby;

And whereas there is now due and unpaid on said indebtedness to the said mortgagee the sum of \$16.-78¢ 92:

Now therefore, the property described in said mortgage, to-wit:

All sheep and horses of every kind, character and description owned by the mortgagor, including:

813 ewes one year old
300 ewes two years old
2400 ewes three, four and five years old
630 ewes six years old
100 ewes, aged
586 ewe lambs
123 wethers
98 bucks

All above sheep marked Z with paint.

12 work horses
10 saddle horses

Also: 290 tons of hay and all other hay, straw, forage and other livestock feed now owned or hereafter acquired by said mortgagor;

Also: All increase of like kind or progeny, also the wool of animals described above;

Also: All wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stackers, loaders, and other similar ranch or farm machinery;

Also: All grazing or right of way privileges, permits or agreements; or as much thereof as may be necessary, will be sold pursuant to the power of sale in said mortgage contained, which has become operative, and to the statute in such case made and provided, at public sale to the highest bidder for cash on the 5th day of February, 1935, at 2 o'clock P. M. of said day at the ranch of the mortgagor, located 14 miles Northeast from Armells, County of Fergus,

State of Montana, to satisfy the debt secured by said mortgage and the costs and expenses of whatever nature, of these foreclosure proceedings.

Dated at Lewistown, Montana, this 28th day of January, 1935.

REGIONAL AGRICULTURAL
CREDIT CORPORATION OF
SPOKANE, WASHINGTON
By EDGAR C. COOPER,
Agent

(Marked Exhibit "A" in ink)

MORTGAGEE'S RETURN OF SALE UNDER
CHATTEL MORTGAGE FORECLOSURE

State of Montana,
County of Fergus—ss.

Edgar C. Cooper, being first duly sworn upon oath deposes and says:

That he is now and for more than ninety days past has been the duly appointed and acting agent of the Regional Agricultural Credit Corporation of Spokane, Wash., having a branch office located at Helena, Montana:

That pursuant to instructions received from said Regional Agricultural Credit Corporation of Spokane, Washington, the mortgagee named in that said chattel mortgage executed by Simon Douglas of Fergus and Petroleum Counties, on the 27th day of December, 1933, which said mortgage was duly filed

in the office of the County Clerk and Recorder of Petroleum County, on the 9th day of January, 1934, and being No. 7222 of the chattel mortgage records on file in the office of said County Clerk, and pursuant to the power of sale contained in said chattel mortgage, took into possession the personal property described in said chattel mortgage, and proceeded in accordance therewith to sell the property, and notice of sale was posted for the 5th day of February, 1935, at the hour of 2 o'clock P. M. at the ranch of the mortgagor, located 14 miles northeast from Armells in said Fergus County, Montana, and on the 28th day of January, 1935 posted five notices of said sale, a copy of said notice being hereunto attached and marked Exhibit "A", in five public places in said Fergus County, Montana, one of said notices being posted at the designated place of sale; one of said notices being posted at the door of garage at horse ranch; one of said notices being posted on a barn at Fergus near road; one of said notices being posted at building next to post office at Hilger, one of said notices being posted at Court House, Lewistown; all in Fergus County, Montana.

That on the 5th day of February, 1935, at the hour of 2 o'clock P. M. at the above mentioned ranch of the mortgagor in said County, the undersigned, proceeded to sell, and did sell at public auction to the highest bidder for cash, the said property described in said chattel mortgage; the property so sold, the purchaser and the price paid therefore being as follows, to wit:

Daley Johnson: 1934 ewe lambs & few wethers @ \$4.10	1453 head	\$5957.50
O. A. Nepstad: Old band of ewes @ \$2.25	1080 head	\$2430.00
H. Lingshire: Young band of ewes @ \$3.40	1237 head	\$4205.80
Matt Wildschultz: 21 head of horses		860.00
Pergus Ranch Co. 308 sacks molasses cake @ \$1.30 per sack		400.40
Tom Wight: 236 cut back lambs and ewes; some old bucks		110.00
Mike Mackler: Machinery, tools, etc., as follows:		
1 Ford coupe, small tools, 3 shovels, 2 spades, 2 iron bars, 2 hand saws, 2 cross cut saws, 1 vice, 1 anvil, 1 square, 3 log chains, 2 sheep hooks, forge, 5 axes, 1 hand rake, 1 pitch fork, 7 lanterns, 2 pack saddles, 4 sets harness, 1 potato cultivator, 1 snow plow, 1 power wood saw, 1 Twin City Tractor, 1 potato planter, 2 bull rakes, 1 hay rake, 1 hay stacker, 3 sheep wagons, 2 mowers, 2 bob sleds, 2 hay racks, 1 truck wagon, 2 wagons, 1 two wheel cart, 4 pack saddle bags, 2 saddles, 1 sloop, 40 tepee tents, 3 lambing tents, 15 panels, 35 sheep pelts, 30 small panels		435.00
H. R. Cameron: 46 tons old hay, very poor @ \$2.10		96.60
Tom Wight: 800 bu. oats @ \$1.50		12.00
J. A. Robinson Trustee: oats, hay and Blue Joint, for \$4.25 T.		
90 tons later resold to D. G. Disbrow for \$5.50		495.00
		<hr/>
		15,002.10

The purchasers being the above parties, and the price paid therefor being the sum of fifteen thousand two and 10/100 dollars (\$15,002.10).

That the proceeds of said sale were paid to the mortgagee, whose receipt therefore, marked Exhibit "B" is hereto attached, thereby referred to and by this reference made a part hereof.

EDGAR C. COOPER

Subscribed and sworn to before me this 6th day of Feb. 1935.

J. A. ROBINSON

Notary Public for the State of Montana. Residing at Helena. My Commission expires 12-26-36.

(Notarial Seal)

Exhibit "B"

Statement of Sale under Chattel Mortgage Foreclosure, February 5, 1935.

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON

Mortgagee,

vs.

SIMON DOUGLAS,

Mortgagor

Posting notices, seizure, caring for, and taking property to place of sale.....	\$ 306.82
Filing return of sale.....	1.00
	<hr/>
Total Expenses of Sale.....	\$ 307.82
Total sale proceeds.....	15,002.10
Less expenses of sale.....	307.82
	<hr/>
Net Proceeds of Sale.....	\$14,694.28

Disposition made of proceeds of sale:

The net proceeds of said mortgage sale, to-wit \$14,694.28, were paid to RACC of Spokane, Washington, and credited on the mortgage obligation owing to it by said mortgagor. Said mortgagor, after receiving credit for said net proceeds of said sale, owes a balance of \$1694.64 to said RACC of Spokane, Washington, besides interest.

Mr. Van Cott: Defendant's Exhibit "2" is the note that was signed by Simon Douglas.

Mr. DeKalb: It is like the one in the pleading?

Mr. Van Cott: It is precisely the same.

Mr. DeKalb: No objection. [138]

Mr. Van Cott: We offer it in evidence.

The Court: Let it be received in evidence.

December 15, 1934.

No. 124.

\$7,000.00

1934

Helena, Montana December 27, 1934.

December 15, 1934. - - - - - after date, for value received, we and each of us, jointly and severally, promise to pay to the order of the REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, at its office in the City of Helena, State of Montana

SEVENTEEN THOUSAND and no/100 Dollars.

with interest at the rate of Six and One-half (6½) per cent per annum from date hereof, payable at maturity. In the event this note is placed after maturity in the hands of an attorney for collection or suit is brought on the same, or any portion thereof, we and each of us, jointly and severally, further agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged, and to execute and consent to payment, demand, protest, and notice of non-payment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

Address Armells, Montana.

Case # 1237 - Chapman vs Ry and Agricultural Credit Corporation

5000 E. # 1
Fred Feb 20 1940 3 return back.

Simon Douglas

I (we) hereby guarantee payment of this note, or any portion thereof, up to the enforcement of this guarantee, including reasonable attorney's fees, and I (we) waive pre-comment, protest, demand, and notice of every kind, and consent that the time of payment may be extended without notice to me (us).

Frederick, Montana Credit Bank, of Spokane, Washington, is authorized to receive and collect on behalf of the holder of this note, and to make payment thereon, and to execute and consent to payment, demand, protest, and notice of non-payment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

DATE	INTEREST		PAYMENTS	BALANCE
	Amount	Folio		
Oct 21 '34	\$			\$ 16,000 -
Nov 10 - 13 '34				152.78 05
Dec 15 '34				1447.3 39
Dec 27 '34				1396.2 91
Dec 31 '34				1256.2 47
2-11-35			97.00	1356.2 47
2-14-35			661.81	6813.66
2-15-35			945.00	5868.66
2-15-35			96.60	5772.06
2-15-35			60.38	5711.68
2-15-35			63.02	5648.66

Simon Douglas

Due

No.

9156-continued

Helena, Mont.

promise to pay to the order of the REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASH., at its office in the city of Helena, State of Montana,

with interest at the rate of six and one half (6 1/2) percent per annum from date hereof, payable at maturity,

In the event this note is placed after maturity in the hands of an attorney for collection or suit is brought on the same, or any portion thereof, we, jointly and severally, further agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

The makers and endorser of this note severally waive presentment for payment, demand, protest, and notice of nonpayment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

Address

10-1163

I (we) hereby guarantee payment of this note, or any renewal or extension thereof, and all expenses of collection thereof, or attorney's fees, and I (we) waive presentment, protest, demand, and notice of every kind, and consent that the time of payment may be extended without notice to me (us).

For value received, the Montana Agricultural Credit Corporation of Spokane, Wash., has loaned to me (us) the sum of \$1,000.00, to be repaid by me (us) in installments of \$100.00 per month, beginning on the 1st day of June, 1935, and continuing until the 1st day of June, 1940, at which time the balance of the loan shall be paid in full. The loan is made subject to the terms and conditions set forth in the attached promissory note, which is hereby accepted by me (us) and the same is incorporated in this agreement.

DATE	INTEREST		Bel	PRINCIPAL 5648.66	
	Amount	Due to—	Payments	Balance	
2-11-35	\$		\$ 4205.80	\$ 1442.86	
2-15-35			200 -	1242.86	
3-6-35			493.70	749.16	
3-29-35			496.40	252.76	
N. M. STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCT. 23 1941 PAUL P. O'BRIEN, CLERK					

Mr. Van Cott: Number "3" is the original chattel mortgage, dated December 27, 1933, from Simon Douglas to the defendant.

Mr. DeKalb: It is the same as the exhibit in the pleadings?

Mr. Van Cott: Yes, that is correct, and we offer Defendant's Exhibit "3" in evidence.

Mr. DeKalb: No objection, except on the ground of its materiality.

The Court: Let it be received in evidence.

DEFENDANT'S EXHIBIT NO. 3

A. No. 12806.

L. No. 9156.

CHATTEL MORTGAGE

This Mortgage, made the 27th day of December in the year 1933 by Simon Douglas, (whose post-office address is Arnells, State of Montana), mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, (maintaining a branch at Helena, Montana) mortgagee:

Witnesseth: That for a valuable consideration, to-wit: a loan or loans of money, the mortgagor mortgages to the mortgagee the following described personal property situated, at the time of the execution of this mortgage, in the County (or Counties) of Fergus and Petroleum, State of Montana, to-wit:

All sheep and horses of every kind, character, and description owned by the mortgagor, including:

813 ewes one year old
300 ewes two years old
2400 ewes three, four and five years old
630 ewes six years old
100 ewes, aged
586 ewe lambs
123 wethers
98 bucks

5050

All above sheep marked Z with paint.

12 work horses
10 saddle horses

Also: 290 tons of hay and all other hay, straw, forage and other livestock feed now owned or hereafter acquired by said mortgagor.

The marks and brands used to describe the livestock are holding marks and brands and carry the title although said livestock may have other marks and brands. This mortgage is intended to include and there is included herein all increase of like kind or progeny, also the wool of animals described herein from year to year during the life of the mortgage.

There is also included herein and mortgaged hereby all wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stack-

ers, loaders, and other similar ranch or farm machinery. Also all water, grazing or right of way privileges, permits or agreements. There is further mortgaged and included herein all hay, straw, range, forage and other livestock feed acquired by harvest, purchase or otherwise during the life of this mortgage provided, however, such livestock feed may be used solely for the purpose of feeding the livestock mortgaged herein and for no other purpose. It is understood, agreed and covenanted that this mortgage shall and it does mortgage all of the property covered by specific or general description herein of the kind or character referred to in any manner acquired by the mortgagor during the life of this mortgage, unless expressly excepted in the typewritten portion hereof. While exchanges or substitutions are covered by this mortgage, none shall be permitted except by written consent of the mortgagee in each separate instance. The mortgagee and/or any holder of this mortgage to have the right to at all times examine and check all property intended to be mortgaged hereunder.

This mortgage is given as security for the payment to the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the city of Helena, State of Montana, of the sum of Seventeen Thousand (\$17,000.00) Dollars now loaned to the mortgagor, according to the terms of mortgagor's promissory note (s), bearing even date herewith, payable to the order of the mortgagee, and described as follows: one note for \$17,000.00,

payable December 15, 1934 after date, one note for \$....., payable after date, said note (s) being for value received, and to bear interest at the rate of —6½— per cent per annum from date until paid, interest payable at maturity.

The makers, endorsers and guarantors of said note severally agree to pay an attorney fee in case payments shall not be made at maturity and the makers, endorsers and guarantors of said note severally waive presentment for payment, demand, protest, and notice of non payment thereof and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them. The endorsers and guarantors also severally consent to any extension of time and substitution of collateral.

This Mortgage is also security for such further and additional sums of money as may from time to time, during the life of this instrument, but at the discretion of the mortgagee, be advanced and loaned by said mortgagee or assigns, to said mortgagor, together with the interest thereon, which said future advances are now in contemplation and when made, are to be evidenced by a note from said mortgagor to said mortgagee or assigns, and are to be as fully secured hereby, as though the same were specifically described and set forth herein, but for no greater additional amount, however, than Twenty Thousand (\$20,000.00) Dollars.

And this Mortgage shall be void if such payment be made.

But in case default be made in payment of the principal or interest as provided in said promissory note (or any thereof) then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns. The sale under the said power of sale shall be advertised by notice posted in five (5) public places in said County, one of which shall be posted at the designated place of sale at least five days prior to such sale, giving the time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

It Is Further Agreed, That the said mortgagor, successors or assigns, shall have the right to remain in possession of the above described property until default be made herein by said mortgagor, provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note (s) or if, prior to the ma-

turity of said indebtedness, said described property, or any part thereof, shall be attached, seized or levied upon, by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons as creditors, or for taxes, or otherwise, or in any manner, or if the said mortgagor or any other person or persons, shall remove, or attempt to remove, said property, or any part thereof from the said county, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note (s) then and in such event, or in either of such events the said mortgagee, its agent or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof, may be found, and may at its option, proceed and sell such property in the manner and to the purchaser as above provided, and hold the proceeds of sale as security for the payment of said note. The exhibition of this mortgage, or a copy thereof, shall be sufficient proof that any

person claiming to act for the mortgagee is duly made, constituted and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

It Is Further Agreed, in the event that this mortgage covers a crop, either cereal, roots or otherwise, either sown, planted or growing, or to be sown, planted or grown, or covers sheep or goats, that when the said crop hereby mortgaged is gathered, harvested or when the sheep or goats shall be clipped or shorn, the said mortgagee or its assigns shall be entitled to the immediate possession of such crop or clip, and the said mortgagee or its assigns, shall have the right to harvest, thresh, or in the event it be sheep or goats, clip or shear the same, and transport and haul such crop or clip from premises where the same have been grown and to sell and dispose of the same for the market price obtainable therefor; and that the cost and expense of such harvesting, threshing or clipping or shearing of animals, as the case may be, and of the hauling and transporting such products shall be borne and paid by said mortgagor and shall be covered by the lien of this mortgage; and that until such property is so sold and disposed of by said mortgagee or its assigns the lien of this mortgage upon such property, wherever the same may be, shall continue and remain in full force and effect, it being agreed that any moneys received by the said mortgagee or its

assigns upon the sale of such property, less the amount secured by these presents, shall be returned to said mortgagor, heirs or assigns.

The Mortgagor hereby declares, warrants and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and warrants that the same is free and clear of all liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

It Is Further Agreed, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

The giving of this mortgage is not intended, and shall not be construed, as waiving, releasing or relinquishing any mortgages, liens or other security, if any, which may have heretofore been given to this mortgagee as security to the indebtedness, or any part thereof, herein described, but this mortgage is given as additional security for such indebtedness.

Words used herein in the masculine gender include the feminine and neuter, and the singular number includes the plural and the plural the singular.

The word "mortgagor" whenever herein used means "mortgagors" if there be more than one mortgagor; and where the word "mortgagee" is

used herein it shall include the successors and assigns of the mortgagee.

In Witness Whereof, the said mortgagor hereunto affixes the signature and seal of said mortgagor, the day and year in this instrument first above written.

(Seal)

SIMON DOUGLAS

State of Montana,
County of Fergus—ss.

On this 6th day of January in the year 1934, before the undersigned, a Notary Public for the State of Montana, personally appeared Simon Douglas known to me to be the person (s) whose name (s) is (are) subscribed to the within instrument, and acknowledged to me that he (they) executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal on the day and year in this certificate first above written.

C. M. KELLY

Notary Public for the State of Montana, residing
at Lewistown. My Commission expires Dec.
13, 1936.

State of Montana,
County of Lewis and Clark—ss.

Wallace H. Vennekolt, being first duly sworn deposes and says: That he is an officer, agent, attorney or other representative of Regional Agricultural

Credit Corporation of Spokane, Washington, the corporation named in the foregoing mortgage as mortgagee, viz: its Agent and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

WALLACE H. VENNEKOLT

Subscribed and sworn to before me this 27th day of December 1933.

MARGARET MacDONALD

Notary Public for the State of Montana, residing at Helena, Montana. My Commission expires October 28, 1936.

(Notarial Seal)

The undersigned mortgagor, described in the above mortgage, does hereby acknowledge receipt of a correct and exact copy of such mortgage with acknowledgments shown thereon surrendered to me or us without cost at the time of its execution.

SIMON DOUGLAS

96240

316984

CERTIFIED COPY

No.....

CHATTEL MORTGAGE

SIMON DOUGLAS

—To—

REGIONAL AGRICULTURAL CREDIT
CORPORATION OF SPOKANE,
WASHINGTON

Helena Branch, Helena, Montana

State of Montana,
County of Fergus—ss.

Filed on theday of Jan. 8, 1934, at
4:55 o'clock P. M.

ED. DENNETT

County Recorder.

By DELIA C. MARSHALL

Deputy Recorder.

To County Recorder: In certifying please use
printed form on reverse side hereof.

CERTIFICATE

State of Montana,
County of Fergus—ss.

The undersigned duly elected and acting County
Clerk and Ex Officio Recorder for the above de-

scribed county does hereby certify that the foregoing is a full, true and correct copy of the original chattel mortgage now on file in this office No. 96240 of the chattel mortgage files of this office. The same being a chattel mortgage given by Simon Douglas to the Regional Agricultural Credit Corporation of Spokane, Washington.

In Witness Whereof, I hereunto set my hand and affixed the seal of said county this 9th day of January A. D. 1934.

ED. DENNETT

County Clerk and Ex Officio Recorder.

By DELIA C. MARSHALL

Deputy.

Mr. Van Cott: May it be stipulated that the amount owing on the indebtedness from Simon Douglas to the defendant after the sale was \$1385.01?

Mr. DeKalb: That may be so stipulated.

The Court: Very well, let the record so show.

H. H. PIGOTT

being called as a witness for the defendant, and being duly sworn, testified as follows:

(Testimony of H. H. Pigott.)

Direct Examination

By Mr. Van Cott:

Q. Will you state your name?

A. H. H. Pigott.

Q. Where do you reside? A. Helena.

Q. In 1934 and 1935 what was your connection with the Regional Agricultural Credit Corporation of Spokane?

A. I was Manager of the Helena branch up to the first of 1935, and afterwards Manager of the Corporation.

Q. The handling of the loan and mortgage of Simon Douglas was under your charge and supervision, was it? A. Yes sir. [139]

Q. And were you familiar generally with the condition of that loan in the winter of 1934 and early in 1935? A. Yes sir.

Q. What was its condition?

A. Not very good.

Q. When you were informed of the death of Simon Douglas which I may say the record shows occurred on January 12, 1935, what did you do in regard to the care of the mortgaged sheep?

A. We directed our Inspector, as I remember it, to see they were properly fed, and advanced whatever funds were necessary for their care.

Q. In other words, you took over the responsibility for financing the care of the sheep?

A. Yes sir.

(Testimony of H. H. Pigott.)

Q. After the death of Simon Douglas?

A. There were no funds for that purpose so we had to do it.

Q. Did you communicate with the heirs of Simon Douglas respecting the situation?

A. I can't remember whether we communicated with him, or not, by wire, or otherwise, but he came to Helena to see us.

Q. That is Max Worthington? A. Yes sir.

Q. Max Worthington, the husband of Dorothy Worthington, the heir of Simon Douglas?

A. So I understood.

Q. He came there with Mr. Robinson?

A. I think Mr. Robinson was with him at that time.

Q. What was the conference about in Helena?

A. Largely how the loan stood, and whether Mr. Worthington wanted to continue with the loan, or otherwise.

Q. Was a decision reached in that conference?

[140]

A. Not at that time.

Mr. Van Cott: I believe Judge DeKalb it may be stipulated Defendant's Exhibit "4" is a copy of a telegram from the Regional Agricultural Credit Corporation to Mrs. Dorothy Worthington, dated January twenty-second, without any objection to competency?

Mr. DeKalb: Yes, you don't need to produce from the files of the Western Union the original.

(Testimony of H. H. Pigott.)

Q. Very well, I show you a telegram marked for identification Defendant's Exhibit "4", will you state whether such a telegram as that was dispatched by your office to Mrs. Dorothy Worthington?

A. Yes, I am quite sure that was.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "4".

Mr. DeKalb: To which we object as immaterial, irrelevant, and illustrating no issue in the case.

The Court: It may be received.

(Testimony of H. H. Pigott.)

Q. I call your attention to a document marked for identification Defendant's Exhibit "5"?

A. That is a telegram we received from Max Worthington.

Mr. Van Cott: I agree to connect up the authority of Max Worthington to speak for Mrs. Worthington. We offer in evidence Defendant's Exhibit "5".

Mr. DeKalb: Same objection, and none other, on the promise of Counsel, if they don't connect it up.

The Court: Well, it may be received with that understanding.

THE COMPANY WILL APPRECIATE

SUGGESTIONS FROM ITS PATRONS CONCERNING

SERVICE

1201-S

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable sign above or preceding the address.

WESTERN UNION

(32)...

R. B. WHITE
PRESIDENTNEWCOMB CARLTON
CHAIRMAN OF THE BOARDJ. C. WILLEVER
FIRST VICE-PRESIDENT

SIGNATURES

DL = Day Letter

NM = Night Message

NL = Night Letter

LC = Deferred Cable

NLT = Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination.

Received at 15 West Sixth Ave., Helena, Mont.

HAA147 17 XC=SHELBY MONT 23 125P

1935 JAN 23 PM 1 33

H H PIGGOTT=

REGIONAL AGRICULTURAL CREDIT CORPORATION HELENA MONT=

NOT INTERESTED IN HANDLING SIMON DOUGLAS PROPERTY IF NO

OTHER RECOURSE THAN TO TAKE OVER ALL OBLIGATIONS=

MAX WORTHINGTON.

11/36 32 sm

When perimeters obtain
original mortgage file a cert
to be of a bank order sent to
the bank for our inspection
then we will send a copy
by photostatic copy ready

Me #1237 - Depto Ex # 5
Filed Feb 20-1940

CRGallow
paid

H. H. P.
RECEIVED
JAN 28 1935

Ans'd
Referred to

Mr. J. H. H.

1201-S

(Testimony of H. H. Pigott.)

Cross Examination

By Mr. DeKalb:

Q. You had a conference with Max Worthington and W. E. [141] Robinson prior to or some days I take it or right close to the time when this telegram was sent, did you?

A. It was several days before, I think; I can't remember.

Q. You knew, of course, at that time, that Max Worthington, who had seen you, was not one of the heirs of the Douglas estate; his wife was one of the heirs, did you not? A. I so understood.

Q. Mrs. Worthington did not accompany him on this visit to the office of the Regional Corporation, did she? A. I think not.

Q. You have no recollection of it, at any rate?

A. I don't remember of her being there.

Q. The result of it was that something was said concerning the responsibility for this indebtedness, if they became interested in it?

A. I presume so, of course.

Q. The result of the telegram indicated a condition that Mr. Worthington considered confronted him, and he mentions it in the telegram, that condition being they were not going to assume the indebtedness of Simon Douglas in order to step into the breach?

A. That seems to be the tenor of that letter.

(Testimony of H. H. Pigott.)

Q. You knew as a matter of your general check up that Simon Douglas was heavily indebted to other people other than the Regional, didn't you?

A. I think his statement discloses other indebtedness.

Q. About fifteen or twenty thousand dollars?

A. I couldn't say.

Q. A large sum of money of indebtedness to other persons in addition, that is correct, is it not.

[142]

A. I don't remember the amount but he was indebted.

Q. You know there was an amount of indebtedness? A. Yes sir.

Mr. Van Cott: I have his financial statement here Judge DeKalb, if you would like to see it.

Mr. DeKalb: Oh, yes.

Q. This financial statement, I don't think I will introduce it in evidence, I will hand it to you to refresh your recollection. Is that the financial statement, copy of the financial statement furnished by Simon Douglas?

A. It seems to be the original. I have no doubt that is the original.

Q. According to your information there was a large amount of indebtedness to other persons, was there not?

A. Yes, this shows a very large amount.

Q. None of which, so far as you know, had been paid at that time? A. I presume not.

(Testimony of H. H. Pigott.)

Q. His source of payment was his income from the sheep and that income had been allocated to a reduction of the indebtedness to you, had it not?

A. It showed about \$13,300.00 in addition to the Regional.

Q. Did you take any steps to get in touch with the creditors or many creditors of Simon Douglas, other than yourself, of course, who were secured, with regard to moving in and protecting your security, as you thought?

A. I don't remember.

Q. What is your recollection? Do you have any recollection of having made any attempt to contact other creditors?

A. I have no recollection on the subject at all.

Q. Isn't it a fact, as you know, there was no step taken to [143] contact any of the other creditors?

A. I have no remembrance of what happened.

Mr. DeKalb: That is all.

Re-Direct Examination

By Mr. Van Cott:

Q. I should have asked this on direct examination. Isn't it a fact, after you received the telegram from Max Worthington you then directed the loan be allocated?

A. Yes, we received information to foreclose.

Witness Excused.

MAX WORTHINGTON

being called as a witness for the defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. Max Worthington.

Q. Where do you reside?

A. Helena, Montana.

Q. Your occupation?

A. I am a school teacher.

Q. You are the husband of Dorothy Worthington?
A. Yes sir.

Q. She is the daughter of Simon Douglas, deceased?
A. Yes sir.

Q. In January, 1935, at the time of the death of Simon Douglas, you resided in Shelby, Montana, did you not?
A. Yes sir.

Q. I show you a document marked Exhibit "4". Do you remember when your wife received that telegram?

A. I remember we received a telegram and it was essentially this.

Q. Was that before or after you had been in Helena in [144] a conference with Mr. Pigott?

A. It was after.

Q. At that conference also was W. E. Robinson present, was he not?
A. That is right.

Q. Will you tell the Court briefly what that conference in Helena consisted of?

(Testimony of Max Worthington.)

A. I came to find out just what the obligations were, or what would be necessary if I were to take over the obligations, and it was explained to me the amount of the indebtedness that the Regional claimed due. You might say that was all of the conference, to find out what he owed and what I would have to assume if I would take it over.

Q. Was any conclusion reached in that conference?
A. No.

Q. Did you go to that conference with the knowledge and authority of your wife?

A. Yes sir.

Q. She didn't go with you?

A. No, she did not.

Q. When you returned home you received this telegram, or substantially similar to this one, marked Defendant's Exhibit "4"?
A. Yes sir.

Q. And then you dispatched a telegram marked Defendant's Exhibit "5", did you not?

A. Yes, this looks like it.

Q. That was with the knowledge and authority of your wife?
A. Yes sir.

Cross Examination

By Mr. DeKalb:

Q. In the conference when Mr. Robinson was present the discussion ranged around the assumption of the obligations [145] of Simon Douglas, if you stepped into the breach at that time, is that it;

(Testimony of Max Worthington.)

in other words, you were to assume, that was the substance of the proposal?

A. There was no outright offer made to me. It was suggested, if it could be worked out in any way, I would have to assume the obligations.

Q. Was there any discussion at that time of the other obligations of Simon Douglas owing to other creditors? A. I don't—.

Q. Under this security?

A. I don't recall that we went into anything else, except I asked the question, if there were other debts I would have to assume them also.

Q. Yes. You knew at that time there were other obligations, did you?

A. We had heard by word of mouth there were.

Q. The Regional didn't confront you with any concrete figures on that?

A. As I recall, only the figures concerning his particular mortgage on the property.

Q. So, you obtained no other information than that between the time of your conference and the time you sent this telegram of January twenty-third in which you state, "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations". That is correct, is it?

A. I received no other information, I should say specific or definite information, except what I could get by asking.

Q. You were not interested in stepping in and

(Testimony of Max Worthington.)

taking this personal liability? [146] A. No.

Q. For an obligation as Administrator or otherwise?

A. No, I was not interested because I was not qualified.

Q. Do you know anything about the sheep business yourself? A. No, I don't.

Q. Have you been fortunate or unfortunate enough to have had experience on a farm?

A. You say, had I?

Q. Yes?

A. No, only one or two weeks at a time was all.

Q. In this discussion at the Regional office, how were you going to acquire the title so you could step into this breach; was that discussed?

A. No, it was not.

Q. It was not?

A. I don't know how I was going to acquire title.

Q. Nothing was discussed about probate proceedings or anything of that kind? A. No sir.

Mr. DeKalb: That is all.

Witness Excused.

Mr. Van Cott: We have Mrs. Worthington but I believe you don't question the authority of Mr. Worthington to have acted for her, do you?

Mr. DeKalb: We don't question that. He said she knew about it.

Mr. Van Cott: Then I will forego calling Mrs. Worthington to the stand. Mr. and Mrs. Worthington are very anxious to leave for Helena. Do you have any [147] objections to them being released at this time?

Mr. DeKalb: I rather think not. No, I have no objection.

Mr. Van Cott: Mr. Pigott also wishes to be excused. May we have this witness excused?

The Court: Very well, they may be excused.

VERNE MATHER

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. Will you state your name?

A. Verne Mather.

Q. Where do you reside?

A. Great Falls at the present time.

Q. In 1934 and 1935 what was your occupation?

A. I was one of the credit examiners for the Regional Agricultural Credit Corporation.

Q. As such did you have something to do with the proceedings for the sale of the sheep of Simon Douglas?

A. Yes sir.

Q. I show you a bundle of copies of letters, marked for identification Defendant's Exhibit "6",

(Testimony of Verne Mather.)

consisting of eight copies. Do you recognize these copies of letters? A. Yes sir.

Q. Were the originals of those letters sent out by you? A. Yes sir.

Mr. Van Cott: Now, if the Court please, I have Judge DeKalb's consent not to object to the competency of these copies, and I offer in evidence Defendant's Exhibit "6". These consist of copies of letters addressed to various prospective purchasers of the livestock? [148]

Mr. DeKalb: To which, of course, we make the objection that they are irrelevant to the issues in the case, and moreover there appears in these letters a self-serving declaration. We are not going to be bound by the self-serving declaration that appears in there. I will read that to the Court and the Court may see the point I make. The first sentence reads, "This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security." We don't want to be bound by that statement.

Mr. Van Cott: We don't claim anything by that.

The Court: Very well, with that understanding they will be received in evidence. The objection will be considered later on and the legal aspect of it.

DEFENDANT'S EXHIBIT 6

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana
January 29, 1935

Mr. A. C. Edwards
c/o Farmers State Bank
Denton, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

The sheep described more in detail are as follows:

200 ewes 1's
150 ewes 2's
50 ewes 3's
50 ewes 4's
700 ewes 5's
1136 ewes 6's
50 ewes, old
1653 ewe lambs
114 wether lambs
60 mixed lambs
88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806--Simon Douglas, Deceased
Armells, Montana

Helena, Montana

Mr. Ned Latta
Inspector, R. A. C. C.
Columbus, Montana

January 29, 1935

Dear Mr. Latta:

We understand that you have some parties who are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

The sheep described more in detail are as follows:

- 200 ewes 1's
- 150 ewes 2's
- 50 ewes 3's
- 50 ewes 4's
- 700 ewes 5's
- 1136 ewes 6's
- 50 ewes, old
- 1653 ewe lambs
- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana
January 29, 1935

Mr. Wm. C. McHattie
Plaza Apartments
Helena, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana

Mr. Oliver Ebert
Livingston, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana
January 29, 1935

Mr. R. I. Balch
Cascade, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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1653 ewe lambs
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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana

January 29, 1935

Mr. H. S. Stevenson
310 Fifth Avenue,
Helena, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana
January 29, 1935

Mr. Peder Hanson
242 S. 4th St. W.
Missoula, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana

Mr. Sam Murphy
Livingston, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana
January 29, 1935

Mr. V. R. Gallantine
Martinsdale, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch
Regional Agricultural Credit Corporation
of Spokane, Washington
Division of
Farm Credit Administration

In Reply Refer to
C12806—Simon Douglas, Deceased
Armells, Montana

Helena, Montana

Mr. A. T. Hibbard
Union Bank and Trust Company
Helena, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Mr. DeKalb: Why not consider them read?

Mr. Van Cott: Very well.

The Court: Very well.

Mr. Van Cott: That is all.

Witness Excused

J. A. ROBINSON

being called as a witness for the Defendant, and
being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. You may state your name?

A. J. A. Robinson.

Q. Where do you reside?

A. Helena, Montana.

Q. What is your occupation?

A. At the present time I am Inspector of the
Regional Agricultural Credit Corporation at Salt
Lake City. [149]

Q. What was it in 1934 and 1935?

A. Inspector and Credit Examiner of the
Regional Agricultural Credit Corporation in
Helena.

Q. When did you first have anything to do with
the Simon Douglas outfit loan and mortgage?

A. I think it was the next date after the fore-
closure notice had been posted for sale of his prop-
erty.

(Testimony of J. A. Robinson.)

Q. What were you directed to do in that regard?

A. I was directed to go down and try to shape the property up as best we could to get the most out of it at the sale.

Q. What did you do pursuant to those instructions?

A. I went to Lewistown and took Ben Jefferson with me and picked up Mr. Cooper. We went out and got the sheep in to mouth them.

Q. Who is Ben Jefferson?

A. Another Inspector for the Regional Agricultural Credit Corporation.

Q. Residing where? A. Great Falls.

Q. Who was Mr. Cooper?

A. Mr. Cooper was an Inspector residing at Lewistown.

Q. E. C. Cooper? A. Yes sir.

Q. He was also connected with the Regional Agricultural Credit Corporation?

A. Yes sir.

Q. You say the three of you arranged to mouth the sheep? A. Yes sir.

Q. When did you do that with reference to the date of the sale?

A. I think it was about two days prior to the sale. I would not be sure.

Q. I show you a document consisting of four yellow sheets [150] which have been marked for identification Defendant's Exhibit "7". Will you state what that is?

(Testimony of J. A. Robinson.)

A. The first sheet is a tally of one band of the sheep, including some bucks. The second sheet is another tally of another band of sheep, showing the ewes and bucks separately. The next sheet is a summary of the previous two tally sheets, and the last one is a list of the property as it sold at the sale.

Q. The first sheet is in whose handwriting?

A. E. C. Cooper's.

Q. The second sheet is in whose handwriting?

A. E. C. Cooper's.

Q. The third sheet is in whose handwriting?

A. Mine.

Q. And the fourth sheet is in whose handwriting?
A. In my handwriting too.

Q. This is the original record made by you people who mouthed and counted the sheep?

A. In preparation for the sale, yes sir.

Q. How did you conduct this mouthing?

A. Well, Mr. Cooper tallied; Mr. Jefferson mouthed, and I was kind of assisting around there, helping crowding them up the chute and we had the assistance of a herder.

Q. You handled the gate? A. Yes sir.

Q. You handled the gate and let a sheep out?

A. I let the sheep out.

Q. Out to Jefferson and Jefferson examined its mouth and reported the result?

A. Yes sir.

Q. And then Cooper tallied the result?

(Testimony of J. A. Robinson.)

A. Yes sir. [151]

Q. Did you mouth all the sheep in those bands?

A. Yes sir.

Q. Did you make any effort in regard to securing bidders at that sale?

A. I think I was the one, I requested these letters be written that were just received in evidence so I would feel more sure we would have bidders who could take the sheep.

Mr. Van Cott: Now, Judge DeKalb, I will connect this up with other witnesses but I can't do it all at once.

Q. Will you tell the Court what the result of your mouthing and count was in numbers?

A. I will have to have that sheet to refer to because I can't remember.

Q. What I want you to do is to state the number of ones, twos, threes, and so on in each of those two bands?

A. The first band contained 4 yearlings; 22 two-year olds; 68 three year olds; 185 four year olds; 347 five year olds; 422 aged sheep, 2 lambs; also 19 bucks four years old; 12 bucks five year olds; 5 bucks, aged, making a total of 1086 sheep in this band.

Q. That band was the smaller of the two bands, was it not?

A. Yes sir. The other band contained 20 yearlings; 203 two year olds; 423 three year olds; 240

(Testimony of J. A. Robinson.)

four year olds; 205 five year olds, and 122 aged ewes. In fact, these are all ewes. 17 four year old bucks.

Q. Before you go on, you stated 122 aged. Did you add to that later on 33?

A. I will get to that.

Q. Very well?

A. Yes, we did. That was added over here; 33 aged sheep. [152] There are 17 four year old bucks in the last band and 18 five year olds and 3 aged, making 1251 in this band.

Q. I believe you testified in that smaller band you had 4 yearlings and in the other band 20 yearlings?
A. Yes sir.

Q. Should that not be the other way around?

A. No.

Q. No? A. No.

Q. There were 4 in the smaller band and 20 in the larger band, is that correct? A. Yes sir.

Q. What was the condition of these two bands of sheep?

A. They were in fair condition. The larger band was in slightly better condition than the smaller band.

Q. Do you know how many lambs there were?

A. 1400 and some; to be exact, 1453 ewe lambs.

Q. Were there a few wethers in with those ewe lambs?

A. There might have been a small sprinkling of lambs.

(Testimony of J. A. Robinson.)

Q. What was the condition of those lambs?

A. They would weigh, in my opinion, in the neighborhood of fifty-five pounds.

Q. Is that good condition, or otherwise?

A. For a lamb of that age it is in good condition.

Q. What would it indicate in regard to feed conditions?

A. Feed conditions—they had been through a pretty serious year, the previous year, in 1934, and they were bound to be short of feed.

Q. Were you present at the sale?

A. Yes sir.

Q. What time of the day did it commence?

A. Two o'clock, I believe.

Q. How long did it last? A. Until dark.

Q. Until dark? A. Yes sir. [153]

Q. What attendance was there at the sale?

A. As near as I can recollect, I think there were around seventy-five people there.

Q. Were *there* some substantial bidders present?

A. Yes sir.

Q. Will you name them to the Court?

A. There was Henry Lingshire, Bill Ragen, Daily Johnson, Mr. Balch, Mr. Wildschults. There were others there but I don't recall them.

Q. Was Mr. Balch there?

A. I got that in.

Q. Do you recall a banker by the name of A. C. Edwards being there?

(Testimony of J. A. Robinson.)

A. I understood he was there. I didn't see him myself.

Q. Do you recall a man by the name of Fush?

A. Yes sir.

Q. Was he present? A. Yes sir.

Q. Describe to the Court the way the sale was conducted?

A. Mr. Cooper was the auctioneer, and we had the two bands in separate corrals so we could handle them, and he dwelt on these sheep really too long I thought to get the best he could for them, to give everybody an opportunity. Everybody had an opportunity to go in among the sheep and mouth them and judge for themselves the age of them.

Q. Did they go in and examine them?

A. Yes, previous to the sale they were in and out among them for an hour or more.

Q. Did Mr. Cooper give these respective bidders an opportunity to make their calculations also?

A. Yes sir.

Q. What was the first lot sold? [154]

A. The first lot sold was the 1080 bunch. 1086 here but when they were delivered there was only 1080.

Q. In that bunch there were 4 yearlings, 22 two year olds, 68 three year olds, 185 four year olds, 347 five year olds and 422 aged, is that right?

A. And 2 lambs and 36 bucks.

Q. What was the successful bid on those?

A. \$2.25 per head.

(Testimony of J. A. Robinson.)

Q. How long have you been in the sheep business or connected with the sheep business?

A. I have been connected with loans and investigations on livestock, oh—twenty years, or more.

Q. During that time have you been familiar with the market prices and values of sheep in this territory?

A. To some extent. To the extent I have sold considerable sheep.

Q. Have you an opinion as to whether or not the price paid for that lot was a fair value of them?

Mr. DeKalb: To which we object. He has not been shown to be qualified.

The Court: I doubt if you have gone far enough in qualifying him, have you?

Q. Were you familiar with the market value of sheep of this quality on the fifth day of February, 1935 in Fergus County, Montana?

A. I rather think so.

Q. Have you an opinion as to whether the price received for this lot was a fair market value of it?

Mr. DeKalb: I object to that. That is brought about in an indirect way in establishing values.

Let's [155] find out what this man was willing to say was the value of sheep of that character in that vicinity at that time.

Q. Very well. Have you an opinion as to the market value of sheep of this quality and kind in Fergus County, Montana on February fifth, 1935?

A. Yes sir.

(Testimony of J. A. Robinson.)

Q. What is your opinion was the fair market value of those sheep?

A. The price that was obtained for them.

Q. What was the next lot sold?

A. The next lot was the larger band.

Q. Consisting of 20 yearlings, 203 two year olds, 423 three year olds, 240 four year olds, 205 five year olds and 155 aged?

A. 122 aged. There were 38 bucks there too.

Q. Who was the successful bidder of that lot?

A. Mr. Ragan.

Q. Was it Ragan or Lingshire?

A. That is the way I have the name on my list here; they were working together.

Q. What was the price paid for them?

A. \$3.40 a head.

Q. Would you say in your opinion that was a fair value of those ewes in Fergus County, Montana on February fifth, 1935?

A. \$3.40, yes sir.

Q. What was the next lot sold?

A. The next lot sold was 21 horses.

Q. 21 horses? A. Yes sir.

Q. Who was the successful bidder?

A. Matt Wildschults.

Q. What did he pay? [156]

A. He paid \$860.00 for the 21 horses.

Q. What was the next lot sold?

A. Molasses cake.

(Testimony of J. A. Robinson.)

Q. What did that consist of?

A. It consisted of 308 one hundred pound sacks of cake.

Q. What did it sell for?

A. \$1.30 per sack.

Q. To the Fergus Ranch Company?

A. Yes sir.

Q. Do you know anything about the value of molasses cake in Fergus County, Montana on February fifth, 1935?

A. Well, my recollection is it was in the neighborhood of \$40.00 a ton. That would make it about two dollars a sack.

Q. What about the demand for molasses cake at that time of the year?

A. The demand had slacked off. People were pretty well filled up with their feed for the winter, and the demand would not be very great at that time, unless you caught somebody without feed.

Q. What was the next lot sold?

A. 236 small cut back lambs and some bucks with a sprinkling of old ewes in them; a hospital bunch.

Q. Please explain?

A. The cut back lambs are small lambs that have not done well and need extra care and they place them in what is called a hospital.

Q. By hospital, you mean they have to be fed certain special things?

(Testimony of J. A. Robinson.)

A. Yes, they have to be fed better than the others.

Q. What did they sell for, the 236?

A. \$110.00 for the 236. [157]

Q. What efforts did the auctioneer make to make that sale?

A. That was the hardest sale of all. The auctioneer had to plead with Wight for a long while to get him to take them.

Q. Tom Wight was on the ground in charge for Simon Douglas? A. Yes sir.

Q. What was the next lot sold?

A. The machinery equipment.

Q. Of what did that consist—describe to the Court?

A. It consisted of hay machinery and tractor, an old tractor, an old car, some wagons and sheep camp.

Q. What was its condition?

A. Badly run down.

Q. What did it sell for? A. \$435.00.

Q. What was the next lot you sold?

A. The hay. 46 tons of hay to H. R. Cameron.

Q. What was it sold for?

A. \$2.10 per ton.

Q. Will you describe it, please?

A. It was some two year old hay or three possibly some of it. For the greater part it was almost entirely cheap grass.

(Testimony of J. A. Robinson.)

Q. Is cheap grass good to feed or otherwise?

A. Cheap grass is the poorest kind of feed.

Q. What effect does the age of the hay have on its quality and value?

A. Well, there is the possibility or probability having it in previous years filled with moisture, and getting it soaked down pretty well and it will spoil in the stack.

Q. What was the next lot you sold?

A. 90 tons of oat hay and blue joint hay.

Q. You say 90 tons? A. Yes sir.

Q. What did that sell for? A. \$4.25.

Q. Who bid that in? [158]

A. I bid it in as Trustee. I couldn't find any one to bid on it.

Q. You couldn't find a buyer and you bid it in?

A. Yes sir.

Q. Later on did you sell it? A. Yes sir.

Q. To whom did you sell it?

A. I think to Mr. Disbrough.

Q. Do you recall what you received for it?

A. I received more than what I paid for it.

Q. \$5.50? A. I might have, I don't know.

Q. Did you credit Simon Douglas with the full amount you received? A. Yes sir.

Q. Describe the 90 tons of oat hay and blue joint?

A. Well, blue joint is rather a good feed and oat hay is good feed up until perhaps after the first of

(Testimony of J. A. Robinson.)

the year. The mice get to working on it so hard there is a lot of waste.

Q. What was the next lot you sold?

A. 800 pounds of oats.

Mr. Van Cott: The return in the pleadings show that as bushels and it should be pounds.

Mr. DeKalb: I imagine so.

Q. What did you receive for this 800 pounds of oats? A. \$1.50. Twelve Dollars.

Q. What was the next lot you sold?

A. That was all.

Q. What was the next lot you sold?

A. That was all of it.

Q. You haven't mentioned the lambs yet?

A. The lambs?

Q. Yes? [159]

A. Oh, you didn't inquire about them, did you. I think the lambs were sold there before or after the ewes.

Q. Who was the successful bidder for the lambs?

A. Daley Johnson.

Q. What did he pay? A. \$4.10.

Q. What in your opinion was a fair value of this bunch of 1453 ewe lambs in Fergus County on February fifth, 1935 per head?

A. Oh, from \$3.00 to \$3.25 a head.

Q. The bid you say was \$4.10?

A. Yes sir.

Q. Was there anything unusual that occurred during the progress of that sale? A. Yes sir.

(Testimony of J. A. Robinson.)

Q What was it?

A. Mr. Johnson served notice of protesting the sale on Mr. Cooper.

Q. Mr. Johnson, who is he?

A. Of the National Bank of Fergus County. I think that is the name of the bank.

Q. Did he say anything or just serve the notice?

A. No, he didn't. He served the notice before the sale.

Q. What was done with the notice?

A. I think it is in the file.

Q. It was not read or announced?

A. No sir.

Q. Did anything else unusual occur?

A. Yes, Mr. Vralstad from Stanford came in to protest the sale to Mr. Cooper.

Q. Tell what he said?

A. Well, he was talking with Mr. Cooper and Mr. Cooper told him to come and see me, and I took him off and he said we couldn't handle the sale without an Administrator, I [160] believe it was; I couldn't say the exact words he used.

Q. In what tone of voice did he say that?

A. He talked very reasonable and fair to me.

Q. Was it said in a tone of voice so it could be heard there generally? A. I don't think so.

Q. What did you do with this gentleman after he made that statement to Mr. Cooper?

A. He went with me over to the side of the shed and we talked there and the sale continued.

(Testimony of J. A. Robinson.)

Q. Was that the end of that episode?

A. Yes sir.

Q. So far as you are aware did either of those events influence the bidding?

A. I don't think so.

Q. Was the property offered as a whole in addition to being offered in part?

A. I can't recollect that.

Cross Examination

By Mr. DeKalb:

Q. Mr. Vralstad specifically drew or directed your attention to the fact that he claimed the sale was an illegal sale, resulting from a violation of the statute of Montana, prohibiting a sale being made in the interim between the death of the party and the appointment of an administrator, did he?

A. It is possible. I would not say he did or that he did not.

Q. You saw Mr. Vralstad discussing some matter with persons who came up there as bidders, did you not?

A. No sir.

Q. You did not? A. No sir.

Q. You would say that he did not? [161]

A. No, I would not say that he did not.

Q. He didn't discuss these matters with persons who were bidders. Now, when you base your statement or when you make your statement of values here, you are influenced, are you not, by the fact that here was a public sale and these prices were

(Testimony of J. A. Robinson.)

obtained at a public sale, you are influenced by that, are you not, in stating that——?

A. Not necessarily.

Q. You knew of sales of sheep, lambs, ewes of different ages, some of the same age as these, occurring in the county or in the same period, influenced by the same price conditions, for more money than that, didn't you, at that time?

A. No sir, I did not.

Q. Were there any other sales that you were cognizant of that occurred in the area that would be controlled by the same conditions during or around that time? A. No sir.

Q. What then was it that gave you an index as to these values, what did you base it on?

A. I based it on the fact that the Government bought those for about a dollar in the previous fall.

Q. You knew the conditions under which that was done? A. Yes sir.

Q. That was done with the idea of getting rid of a bad market condition later on. It was done with the design of improving the condition of the sheep business? A. No sir.

Q. What was it done for?

A. To avoid a death loss from drought.

Q. You know the Government purchases were slaughtered, were they not? [162]

A. Yes sir.

Q. The avowed purpose and design of the Department in getting rid of them, and buying them

(Testimony of J. A. Robinson.)

up and getting rid of them was to improve the condition of the sheep business, was that not its object?

A. No, it was done to stop the stock grower from taking the loss.

Q. To improve the condition of the sheep industry, was it not?

A. Well, the way I looked at it, and I went through a lot of it in eastern Montana, it was done in this way. The sheep were worth a dollar and they made it two dollars so the owner could pay one dollar to the mortgagee and one dollar to himself.

Q. You don't maintain the Government was influenced to any great extent by market conditions, do you, in the price offered?

A. If they were, they would not have paid two dollars.

Q. They were not influenced at all in doing that. The apparent object was to improve the sheep industry, was it not?

A. No, I think it was to improve the financial condition of the sheep man.

The Court: Let's let it stand at that. That is close enough.

Q. Yes. Now, was there any effort made here to take out of these different bands and throw together the sheep of a certain class. For instance, the lambs, the year old lambs or anything of that kind, what you might consider a prime pick of the flocks? [163]

(Testimony of J. A. Robinson.)

A. The lambs were sold together, and the other were mouthed as listed and represented that way to the buyer.

Q. They were sold in bands? A. Yes sir.

Q. As defined from an attempt to segregate out the choicer animals of those bands and sell them that way. In other words, any purchaser under the system that was put in practice that day was obliged to take some of the unwanted band, some broken mouthed ewes, and some of what have you, whether he wanted them, or not? A. Yes sir.

Q. I say, was any attempt made here to make a real attractive looking bunch of sheep out of these several bands?

A. Well, the best we could do under the circumstances was to mouth them out and given them an idea of the ages in each band, and that is what we did.

Q. Was that the first chattel mortgage auction sale you ever attended? A. No sir.

Q. You have attended others, have you?

A. Yes sir.

Q. Any during that particular winter?

A. No sir.

Q. That was the only sale that you attended—?

A. Well, I said—no. It is possible that I did attend some sale but I don't recollect.

Q. Let's take the period from December until, let's see, May first, December to May first, were

(Testimony of J. A. Robinson.)

you in attendance upon any sales during that period? A. I couldn't definitely say, no.

Q. Were there any purchases or sales of sheep in that period taking place, under your knowledge?

A. I don't think so because most of our people were checked [164] up before the first of the year so I didn't have anything to do about it.

Q. About the only thing you had to go on then was the general mutton market, if we may call it that? A. Yes sir.

Q. And that had largely to do with lambs and younger stuff, didn't it?

A. Well, in the fall, no. About the time of this sale I don't know that that had anything to do with what the markets were based upon.

Q. At this particular moment the normal expectation would be within about seventy days, or something like that, lambing would occur?

A. Yes sir.

Q. You say the bucks were still in the bands?

A. Yes sir.

Q. As indicating the ewes were in process of being bred for the lamb crop in the spring?

A. They should have been bred before that.

Q. You don't know how long the bucks were in there? A. No sir.

Q. December would be the month, would it not?

A. I think for that locality over there.

Q. That would bring the lambs in what month?

A. The first of May.

(Testimony of J. A. Robinson.)

Q. There was a wool crop in expectation coming along about the month of June. Do you recall what the prospective price of wool was at that time or whether any was being consigned at that time?

A. No sir, I don't.

Q. Do you know anything about the band Lingshire purchased?

Mr. Van Cott: I will say we will produce a [165] witness who purchased these sheep and who will testify as to what was done.

Mr. DeKalb: Well, I will ask him.

Q. Do you know anything about the Lingshire sheep which were purchased at this sale. Were they re-sold a few days later?

A. I understood they were sold the next day.

Q. At a handsome profit, almost double what was paid for them?

A. I wouldn't say as to that, I don't know.

Redirect Examination

By Mr. Van Cott:

Q. Counsel asked you whether you made any effort to separate this bunch or these sheep so as to make a separate band. Will you state whether there was anything more that could have been done to improve the bands more profitably?

A. I don't think so at the time or we would have done it.

Q. Calling your attention to the fact that according to your count in that smaller band there

(Testimony of J. A. Robinson.)

were only 110 sheep ones, twos or threes, and that balance of that band were over three?

A. Yes.

Q. What would have been the effect upon the band if you had taken out all the young sheep?

A. It might have caused a lower price.

Q. Calling your attention to the fact, according to your count, the larger band consisted of 1230, there were only 630 ones, twos or threes, what would have been the effect on the aged sheep if you had taken out of that band the ones, two and threes?

A. We would have lost considerably on the price bid for them.

Witness Excused. [166]

BEN JEFFERSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. Ben Jefferson.

Q. Where do you live? A. Great Falls.

Q. What is your business?

A. Brand inspector part time, and part time trading in livestock and cattle.

Q. What was your occupation in 1934 and 1935?

(Testimony of Ben Jefferson.)

A. Inspector for the R. A. C. C. in Helena.

Q. That is the Regional Agricultural Credit Corporation? A. Yes sir.

Q. How long have you been engaged in the livestock business in one way or the other?

A. Well, I was raised on a ranch, and actively have been engaged in the livestock industry either stock or cattle or sheep for the past twenty-five years.

Q. You heard J. A. Robinson testify to mouth-ing the sheep. You are the Ben Jefferson he referred to as having assisted in that operation?

A. Yes sir.

Q. You are the one that actually looked into the mouths of the ewes, are you? A. Yes sir.

Q. Do you recall having done that on that occasion? A. Yes sir.

Q. Did you use your best judgment in reaching a conclusion as to the age of those sheep?

A. I did.

Q. What experience had you had before that time in mouthing sheep?

A. As I say, I had been engaged in the sheep business. I put in a good many years with one of the largest sheep [167] concerns in Montana.

Q. Which was that?

A. J. B. Long and Company.

Q. Did you do mouthing in that connection?

A. Yes sir.

Q. How frequently?

(Testimony of Ben Jefferson.)

A. Well, at least, once a year.

Q. Did you state your best judgment with respect to each sheep you mouthed on that day?

A. Yes sir.

Q. And you expressed it to Mr. Cooper and Mr. Robinson? A. Yes sir.

Q. What was the condition of the ranch out there?

A. Well, it showed the effects of the drouth the summer previous.

Q. What was the condition of the sheep that were sold?

A. They also showed the effects of the drouth.

Q. Which of the two bands of ewes showed the effect of the drouth most?

A. I don't remember whether it was the smaller band or the larger band.

Q. There was a difference, was there?

A. There was a difference.

Q. What about the lambs, what was their condition?

A. They would be classed as poor lambs, light.
Mr. Van Cott: You may take the witness.

Cross Examination

By Mr. DeKalb:

Q. Now, you noticed the spread there, did you not, hay and oats and oil cake, etc. were on hand?

A. Yes sir. [168]

(Testimony of Ben Jefferson.)

Q. Do you know about how much hay it takes to carry a sheep through?

A. Well, it depends on your range conditions and the condition of the sheep.

Q. There has been some testimony here with regard to the range conditions? A. Yes.

Q. What observation did you make there at that time as to the condition of the range?

A. It was not such that it would carry these sheep through the winter.

Q. That would be up to lambing time or when the grass would come?

A. If these sheep were bred to lamb in May, which I understood they were, it looked like a picture of buying quite a lot more feed I would say. That is the picture as presented.

Q. If there was on hand 136 tons of hay and several tons of oil cake, what in your opinion,—how far would that go in helping out the range conditions of some 4200 sheep of every description?

A. The quality of the feed was not right to carry these sheep on through during lambing. It was not the right kind of feed.

Q. Do you have any particular objection to oil cake,—I think it is called molasses cake, is that not good? A. It is considered good, yes.

Q. It sells at quite a high price per ton, if a sheep man comes to buy it, does it not?

A. Yes, sir.

(Testimony of Ben Jefferson.)

Q. Do you know anything about its condition, whether it had been well kept and protected from the weather? [169] A. No.

Q. Did you see it at all that day?

A. It was stored in the shed there.

Q. You didn't make any particular examination of it, did you?

A. No, other than to note the quantity that was there, the amount.

Q. So far as you know, it was well stored and well cared for and in good condition?

A. Yes sir.

Q. You think that you can distinguish a five year old sheep by mouthing, do you?

A. No, it is not possible to tell the exact age of a sheep after it attains its fourth year, but the appearance of the teeth, the amount of wear and cleanliness, you can guess pretty close.

Q. It is not necessarily a broken mouth; there is a distinction between a good mouth, is there not?

A. That is what they call a spreader.

Redirect Examination

By Mr. Van Cott:

Q. What do you mean by a spreader?

A. A broken mouth shows loss of teeth,—some of the teeth have fallen out; they spread before they fall; they show gaps between the teeth.

Q. When their mouth becomes broken or spread they have difficulty in feeding, do they not?

(Testimony of Ben Jefferson.)

A. They can eat but they don't get the right,— they don't eat properly; they don't get the amount of grass they should.

Witness Excused. [170]

ED. C. COOPER

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name? A. Ed. C. Cooper.

Q. Where do you reside? A. Lewistown.

Q. What is your occupation?

A. Ranching.

Q. Are you now connected with the Regional Agricultural Credit Corporation? A. I was.

Q. You are not now? A. No.

Q. You were in 1934 and 1935?

A. Yes sir.

Q. In what capacity? A. Inspector.

Q. Inspector? A. Yes sir.

Q. Were you familiar with the Simon Douglas outfit loan and mortgages? A. Yes sir.

Q. What had you had to do with it?

A. I went out and inspected the hay and range and feeding conditions, and inspected the sheep for the loan.

(Testimony of Ed. C. Cooper.)

Q. When are you referring to, what time?

A. Right after they made the application in November.

Q. Of what year?

A. That would be 1933.

Q. Were you familiar with it from that time on until it was sold?

A. Yes sir.

Q. Referring to the early part of 1935, will you state what the conditions were with respect to feed?

A. Well, the feed was not very good that winter. This feed they had on the west range was very poor sheep feed. It would be all right for cattle feed.

Q. You mean the hay they have described and also the molasses cake?

A. Molasses cake is good for sheep in case of storm; that is [171] what molasses cake is for.

Q. That is what you call emergency feed?

A. That is what you call emergency feed.

Q. Can a sheep man afford to feed that regularly to his sheep?

A. Yes, when he is short of feed.

Q. What was the condition of the sheep at that same time?

A. The sheep showed drouth. They had gone through a couple of years of dry seasons.

Q. What effect does that have upon sheep to go through successive dry seasons?

A. They are not in condition.

(Testimony of Ed. C. Cooper.)

Q. You have heard Mr. Jefferson and Mr. Robinson describe the mouthing of the sheep. You are the Mr. Cooper that participated in that same operation, are you not? A. Yes sir.

Q. I call your attention to Defendant's Exhibit "7", on the first two pages of which there are tallies; were those made by you? A. Yes sir.

Q. Did you correctly tally here the instant that Mr. Cooper called out as he was mouthing the sheep, I mean Mr. Jefferson? A. Yes sir.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "7".

Mr. DeKalb: I think there is no objection to it, if the Court please.

The Court: Let it be received.

1237

Ex # 7

Feb 20 1940

CR. Bureau

Clm.

EB Chapman

Regional Agricultural
Credit Association

15-20-4 = 24

25-22-203 = 226

35-68-4x3 = 491

45-115-240 = 475

55-347-205 = 552

agrd. 422-22-32577

7994

9936

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 23 1941

PAUL P. O'BRIEN

CLERK

[illegible]

26	108 1/2
<u>181</u>	<u>2172</u>
288	543
<u>26</u>	<u>2715</u>
463	

1934 Jan. Lumber, fine wood ✓
 1453 5957 30

O. O. Mfg. Co. @ = 5 1080
~~1080~~ 2715 00
 1237 Pd. 4205 80

White Melancholy 21 lb. Pd. ✓
13383.10

Finger Paints
 Graham's Lk. 130 per sack 308 ✓
400 40

Tom Wright 20 lb. Pd. ✓
(111 00)
14061.10

4
 White Marble Pd. ✓
435 00
11096.00

Black
 H. K. Lumber Co. 210 Pd. ✓
4600 96 00

Get ...
 ... @ 1 ✓
9000 495 00

Oats. 800 lbs.
 Tom Wright Pd. ✓
(12 00)

Old Band Feb. 2, 1935

41 - yearlings	135 - 4 yr old
22 - 2 yr old	347 - 5 yr old
68 - 3 yr old	432 - ages
<u>94</u>	<u>2. Lamb</u>
	956

Bucks 19-4s.

" 12-5s

" 5. ages x
36

94
956
36
1086

Young Band Months Feb. 2, 1935

20 yearlings	240 - 4 yr old
203 - 2 yr old	205 - 5 yr old
423 - 3 yr old	122 - ages
<u>646</u>	<u>567</u>

17 - 4 yr old

18 - 5 yr old

3 - ages

38

646
567
38

1251

(Testimony of Ed. C. Cooper.)

Q. Were you the auctioneer? A. Yes sir.

Q. What preparations, if any, did you make for the conducting of this sale? [172]

A. Well, I spoke to everybody that was inquiring about the sale, and told them what it consisted of.

Q. That is, you told people that the sale was going to occur? A. Yes sir.

Q. Whereabouts did you do that, in what vicinity? A. In Lewistown.

Q. Did you see some of the persons you told about the sale at the sale?

A. I don't remember now.

Q. Now, as auctioner, did you first offer the property for sale as a unit? A. Yes sir.

Q. Did you have any bidders for it as a unit?

A. No sir.

Q. Then did you offer the property in parcels as described by J. A. Robinson? A. Yes sir.

Q. As you proceeded with the sale what efforts did you make as auctioner to secure bids?

A. Well, I tried—any bids I had I would ask for a larger bid.

Q. You made efforts did you to secure better bids? A. Yes sir.

Q. What did you do respecting the length of sufficient time of bidders to make calculations?

A. I think I took all the time required, and some of the bidders thought I took too much.

(Testimony of Ed. C. Cooper.)

Q. Now, Mr. Robinson has testified that a County Attorney, Mr. Vralstad, came to you and made some comment about the sale. Will you tell the Court just what he said?

A. I was in the shed with one band of ewes and Mr. Vralstad came over and said he wanted to protest the sale. I said, "all right, you talk to that gentleman standing over [173] there against the side of the shed".

Q. Who was that? A. Jack Robinson.

Q. Was that all that was said?

A. As near as I can remember, that was all that was said.

Q. Let me refresh your recollection. Did you say to him, "You give me a check for the amount owing and you can"?

A. I believe I said, "You give me a check for the amount of the sale that the Regional Agricultural Credit Corporation has coming for the assignment and you can most likely have the whole thing".

Q. Had you known him before?

A. No sir.

Q. Was he in any way connected with the Regional? A. Not that I know of.

Q. Or in any way connected with any of the bidders? A. No sir.

Q. In what tone of voice did he make that comment? A. It was not unpleasant.

Q. Was it a loud voice? A. No sir.

(Testimony of Ed. C. Cooper.)

Q. So far as you know did it affect the bids in any way? A. No sir.

Cross Examination

By Mr. DeKalb:

Q. What was the condition of the weather there on that day? A. It was a raw day.

Q. What was the condition of the weather on the day preceding it?

A. Well, that was just a raw spell in there. I wouldn't say whether it was objectionable.

Q. Was it squally cast-over weather?

A. Yes sir.

Mr. DeKalb: That is all.

Witness Excused [174]

W. E. ROBINSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. Please state your name?

A. W. E. Robinson.

Q. Where do you live?

A. Lewistown, Montana.

Q. What is your occupation?

A. I am a wool and livestock buyer.

(Testimony of W. E. Robinson.)

Q. How long have you followed that occupation in that vicinity? A. Since about 1925.

Q. Were you acquainted with Simon Douglas in his life time? A. I was.

Q. Describe to the Court the extent and nature of that relationship?

A. I have known Mr. Douglas from approximately 1925 until his death, and I was, more or less, familiar with his affairs, and while he was banking at home he didn't have many difficulties but when he transferred his loan to Helena it was necessary for him to do it through correspondence, and he used to use my office somewhat in order to carry on this correspondence through my stenographer.

Q. During the time the loan of Simon Douglas was with the Regional, from 1933 to 1934, to what extent were you familiar with the condition of that loan?

A. I helped him make up his budgets, and would write to them once in a while asking them for advances, his expenses. I assisted him in making up his renewal application in the fall of 1934. I didn't have anything to do with the application in 1933.

Q. Calling your attention to a document marked for identifica- [175] tion, Defendant's Exhibit "9", is that the renewal application to which you just referred?

A. It is the original of the renewal.

(Testimony of W. E. Robinson.)

Q. Will you look at the reverse of it and see the signature?

A. One of the signatures of the witnesses is mine.

Q. Did you see Simon Douglas sign that application? A. I did.

Q. Then you signed as a witness?

A. That is right.

Q. When he signed it was it made out in the form it now appears in? A. Yes sir.

Q. You stated that you had filled out the information in this application for him?

A. Well, he worked out the information with me regarding the statement.

Q. Then you did the mechanical work of writing it out?

A. I started to write it out and my stenographer finished it.

Q. These figures here that appear were the figures that Simon Douglas, himself, stated?

A. Yes sir.

Q. Calling your attention to the fact it is dated November twenty-seventh, 1934, that is some two months and a half prior to his death, do you recall?

A. That must be the date.

Q. Calling your attention to the fact that Simon Douglas in his application states that he had 200 yearling ewes in his herd, is that what he told you?

A. I can't remember the conversation but I presume that statement is correct.

(Testimony of W. E. Robinson.)

Q. You see it there, don't you?

A. Yes sir.

Q. Then also 200 breeding ewes, twos and threes, that appears there? [176]

A. Yes sir.

Q. 750 breeding ewes, fours and fives, that appears there?

A. Yes sir.

Q. 1186 aged sheep?

A. Yes sir.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "9". There is no objection, Judge DeKalb told me.

APPROVED BY
FARM CREDIT ADMINISTRATION
HELENA BRANCH
Regional Agricultural Credit Corporation
of Spokane, Washington
HELENA, MONTANA

APP. NO. 16317
LOAN NO. 13776
12506

APPLICATION FOR RENEWAL OF CHATTEL MORTGAGE LOANS

For the purpose of obtaining a renewal of my loan in amount of \$2600.00, I furnish you with the following statement and information, which is a true and correct statement of my financial condition.

Dated at Lewistown, Montana this 27th day of November, 1934
NAME Simon Douglas Age 65 Wife's Name Deceased
Children (number) 1 Ages 25 How many boys over 12 years old at home? None
Firm Name (if Partnership) _____
Names of Partners _____ Wife's Name _____
Wife's Name _____

Farm Located 10 miles N. E. from Armells, Montana
(Direction) (Shipping Point)
(P.O.) Armells COUNTY Fergus STATE Montana
(1) Is it possible for you to obtain this loan through a Production Credit Association, a local Bank or some other loaning agency? No. How will you repay this loan? Sale sheep and wool
(2) Has anyone having an interest in this property died since the loan was first made? No If so, give particulars _____

(3) Besides amount necessary to renew my loan, I will need \$ 1550.00 additional for the following purposes:
Personal taxes, \$300.00; Cotton seed cake, \$1250.00

(4) Last year I received from sale of: I estimate it will cost me for operation for the next 12 months:

Cattle	\$	<u>8500.00</u>	Meat	\$	<u>1100.00</u>
Wool estimated value	\$	<u>8500.00</u>	Feed	\$	<u>1515.00</u>
Sheep (Wool not sold)	\$	<u>4400.00</u>	Family Expenses	\$	<u>550.00</u>
Crops	\$	<u>2840.00</u>	Labor	\$	<u>4275.00</u>
Milk and Cream	\$		Gas, Oil and Repairs	\$	<u>520.00</u>
Poultry and Miscellaneous	\$		Interest, Tax, Leases	\$	<u>4360.00</u>
Total	\$	<u>17560.00</u>	Feed for new bucks	\$	<u>2000.00</u>
			Total	\$	<u>14330.00</u>

Furnish separate expense budget form in all livestock loans over \$2500.00.

FINANCIAL STATEMENT

No.	Assets	Value	Liabilities	Amount
	Cattle	\$	R. A. C. C. Loans	\$26000.00
4251	Sheep	\$20110.00	Other Encumbrances on Livestock and Machinery	\$ 9000.00
39000	Unsold Wool	\$ 8500.00	Lewistown Life Ins. Co.	\$10,000.00 also security to this
30	Horses and Mules	\$ 1125.00	Life Against Crops loan	\$
	Grain for Sale	\$	Federal Seed and Feed Loans	\$
	Grain for Feed and Seed	\$	Rent and Leases Payable	\$
265	Hay (tons)	\$ 2650.00	Taxes Unpaid	\$ 300.00
1420	Ewes sold Government	\$ 2840.00	Real Estate Mortgages	\$
	Machinery	\$ 2500.00	Past Due Interest on Real Estate Mortgages	\$
	Life Ins. to offset		Other Indebtedness Liability on	\$
	Natl. Bank Debt	10000.00	Bond securing Judith Basin	\$
	Real Estate - Acres 320 offered to	\$	County Bank deposit	\$ 4000.00
	Description:		TOTAL LIABILITIES	\$39300.00
	Judith Basin Co. as offset	4000.00	Net Worth	\$2425.00
	to their claim.		Total	\$ 17560.00
	Other Assets	\$		
	TOTAL ASSETS	\$51725.00		

(5) State number of acres and kinds of crop next maturing 800 acres hay

How many acres under cultivation? _____ Acres summer fallowed? _____ Acres irrigated? 900 Acres grazing? 6000

State kinds of grain and amount you are reserving for seed none

State amount of hay and other feed now on hand 265 tons hay

(6) State amount Government wheat allotment allowed you \$ none Amount received \$ _____

(7) Have you procured feed or seed advances from Federal or County in previous years? No.

(8) List any contingent liabilities that you have Judith Basin Co. Bank deposit bond \$4000.00

(9) Are there any judgments or suits pending against you? No

(10) If so, in what court docketed and present status? None

(11) Have you ever taken bankruptcy? No.

(OVER)

WITHDRAWN

Date

(12) What mark and brands do you use?

Z in point on back

(13) Give recorded mark and brand certificate number. none

(14) I further state that I am the sole owner of the livestock described herein except as to the liens set out and am entitled to pledge same for the loan applied for, and that a CHATTEL MORTGAGE CONVEYING A FIRST LIEN WILL BE GIVEN COVERING THE FOLLOWING LIVESTOCK:

KIND	BREED	BRAND	NUMBER	VALUE PER HEAD	TOTAL VALUE
Steers 1's					
Steers 2's					
Steers 3's and over					
Heifers 1's					
Heifers 2's					
Cows 3's to 7's					
Cows over 7					
Calves					
Bulls					
Other cattle					
Ewe Lambs (1934)	Ramb.	Z	1713	3 00	5139 00
Yearling ewes	Ramb.	Z	200	7 00	1400 00
Breeding " 2 & 3	Ramb.	Z	200	7 00	1400 00
" " 4 & 5	Ramb.	Z	750	5 50	4125 00
Old " 6's	Ramb.	Z	1186	3 00	3558 00
Wethers Lambs	Ramb.	Z	114	2 00	228 00
Bucks	Ramb.	Z	88	20 00	1760 00
Work Horses			15	50 00	750 00
Other Horses			15	25 00	375 00
Mules					
Mch'y & Equipment					2500 00
TOTAL			4281		21235 00

Estimated calf tally for next year:

calves @ \$..... each.

\$.....

2336 breeding ewes will produce about 2000 lambs

@ \$3.50 each, available by

October 15, 1934

\$7000.00

4251 sheep to be sheared.

Estimated clip 42,000 lbs.

@ 25 cents per lb.

\$10500.00

TOTAL, \$

No. 9956
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

OCT 23 1941

PAUL P. O'BRIEN
CLERK

(15) Is there any livestock or personal property on premises not listed in this statement which is not owned by you? No
If so, give particulars.

(16) What arrangements, if any, for making all or part of your operating expenses outside of livestock? None

(17) Life Insurance. Yes Amount, \$15,000.00 Company Montana Life Insurance Co.

(18) Who is the beneficiary? National Bank of Lewistown, \$10,000.00; My daughter, \$5000.00.

The undersigned agrees that if this renewal application is accepted he will reimburse the corporation for its regular inspection costs (if required) by remittance directly to the corporation of its office in Helena, Montana, or by permitting said costs to be added to the existing principal indebtedness and to be included in the lien of any mortgage given the corporation by the undersigned. The undersigned further agrees, as a part of the consideration of renewal of his loan from the Regional Agricultural Credit Corporation of Spokane, Washington, that upon the request of the said corporation (either before or after the maturity of said renewal loan) he will promptly take all necessary action (including execution of all necessary documents) to refinance the indebtedness owed this corporation either by a loan from a Production Credit Association organized under the Farm Credit Administration, or from some other source. That, in the event of any breach of this undertaking by the borrower, the lender may take any action which it would be entitled to take under said mortgage or mortgage securing such renewal loan for the breach of any condition or covenant therein contained, all of which said covenants and conditions are hereby incorporated herein by reference, to the same extent as if fully set out herein.

FOR INFORMATION OF APPLICANT:

Section 16 (a) of the R. F. C. Act provides:

Whoever makes any statement knowing it to be false, or whoever willfully over-values any security, for the purpose of obtaining for himself any loan, or for the purpose of influencing in any way the action of the corporation, or for the purpose of obtaining money, property, or anything of value under this Act, shall be punished by a fine of not more than \$3,000 or by imprisonment for not more than two years, or both.

The undersigned hereby certifies that he has read this application and knows the contents thereof, that each and every statement contained in this application and the financial statement are true of his own knowledge, and that the answers to the within questions have been made for the purpose of obtaining a renewal of his existing indebtedness to the Regional Agricultural Credit Corporation of Spokane, Washington, Helena, Montana, Branch.

Witness:

(Signed)

Each and every question must be answered plainly and definitely. If the question can not be answered, a statement should be made accordingly.

(Testimony of W. E. Robinson.)

The Court: Very well, let it be received.

Q. Simon Douglas fell sick some time in December, 1934, didn't he? Or you state what your recollection is?

A. I believe it was about that time.

Q. At the time he fell sick did your relationship change? A. Yes.

Q. In what way?

A. He was taken quite badly sick and the Regional I believe demanded some one be placed in charge as overseer on account of his condition. He, more or less, objected to this, in a way. He didn't hurry about doing it but finally Mr. Douglas thought it would be suitable to give me a power-of-attorney in order to keep the bills paid, with the understanding that Tom White, the foreman on the ranch, would continue to physically look after the sheep and care for them.

Q. Showing you Defendant's Exhibit "8", is that the power-of-attorney you just referred to?

A. That is a copy of the power-of-attorney; it is not the original; it is a carbon copy.

Q. I call your attention to the signature. Can you say whether that is the signature of Simon Douglas? A. It is. [177]

Q. And you will observe also this is the original notarial certificate? A. Yes sir.

Q. So the document is actually a carbon copy but it is executed as an original.

A. No answer.

(Testimony of W. E. Robinson.)

Mr. Van Cott: I offer Defendant's Exhibit "8" in evidence.

Mr. DeKalb: No objection.

The Court: Let it be admitted.

DEFENDANT'S EXHIBIT 8

Know All Men by These Presents:

That I, Simon Douglas, of Armells, Fergus County, Montana, have made, constituted and appointed, and by these presents do make, constitute and appoint W. E. Robinson, of Lewistown, Fergus County, Montana, my true and lawful Attorney for me and in my name, place and stead to handle and manage all of my sheep ranching business in the State of Montana, to lease any and all real estate for said purpose that he may think proper and on such terms and conditions as in his judgment may be to the best advantage of myself and said business and for such time as in his judgment may be for my best advantage; to buy and sell sheep for my account at such times and at such prices as he may deem best; to borrow money from the Regional Agricultural Credit Corporation, of Helena, Montana, or from any other corporation, person or agencies that he may deem advisable, giving him full power to sign and execute notes and mortgages, to secure said notes, signing my name by himself

(Testimony of W. E. Robinson.)

as attorney, it being my express intention to give my said attorney full and complete power to bind me by said transactions as fully as I might bind myself by signing and executing said documents personally; to bargain, contract, agree for, purchase, receive, and take possession of all lands and property of every form and description necessary to carry on the said sheep business and to lease, let, demise, release, mortgage and hypothecate all such property, including sheep, lambs and wool upon such terms and conditions and under such covenants as he shall deem satisfactory and proper; also to bargain, agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with choses in action and other property in possession or in action, and to make, do, and transact all and every kind of business of every nature and kind whatsoever, and also for me and in my name and as my act and deed to sign, sell, execute, deliver and acknowledge such deeds, agreements, mortgages, hypothecations, bills, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgments, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary and proper in the premises, and I hereby expressly empower my said attorney to deposit moneys that he may receive in connection with said business in the National Bank of Lewistown, Montana, or any other bank that he may

(Testimony of W. E. Robinson.)

see fit, and also for me and in my name and as my act and deed to sign and draw checks on my account in said bank or any other bank, and do any and all things whatsoever in the handling and management of my sheep and all other property used in connection with my said sheep business that he may think or deem advantageous to me. I also hereby expressly empower my said attorney in fact in my name, place and stead, and as my act and deed, to employ all help, herders, that he may deem necessary for the conduct of said business and I also give him full authority to dismiss any or all such employees or help that he may deem fit and proper at any time for any reason. It is my express intention to give my said attorney in fact, full and complete power to manage my said business, and to execute any and all instruments whatsoever in my name, place and stead and in such form as may be required to give full and complete effect to the foregoing power herein granted, giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney W. E. Robinson shall lawfully do or cause to be done by virtue of these presents.

(Testimony of W. E. Robinson.)

In Witness Whereof, I have hereunto set my hand and seal this 22nd day of December, A. D. one thousand nine hundred and thirty-four.

(Seal) SIMON DOUGLAS

Signed, Sealed and Delivered in the Presence of

.....

.....

State of Montana,
County of Fergus—ss.

On this 22nd day of December nineteen hundred and thirty-four before me Oscar M. Ulsaker a Notary Public in and for the State of Montana, personally appeared Simon Douglas, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate above written.

(Seal) OSCAR M. ULSAKER,
Notary Public for the State of Montana.
Residing at Lewistown, Montana.

My commission expires January 19, 1937.

—————

Q. After that power-of-attorney was executed and delivered just what did you do with respect to the Simon Douglas outfit there from that time on until his death?

(Testimony of W. E. Robinson.)

A. I received reports from Tom White as to how he was getting along to pay the wages of the men employed in taking care of the sheep.

Q. What did you do with respect to advances made by the Regional for operating expenses?

A. That money was placed in the National Bank at Lewistown under the name I believe of Simon Douglas, the signature to be by me as attorney-in-fact.

Q. What did you do with respect to keeping the bills paid?

A. We very carefully tried to keep all bills paid to date as near as we could on account of the condition of Mr. Douglas. Shortly before he died, a few days, Mrs. Worthington called me from Great Falls, where he was in the hospital, reporting that he was very low. Mr. White happened to be in town that day, and we figured up the pay-roll to date and made out checks which he took to the ranch and had endorsed by the men working there and then got the checks cashed prior to Mr. Douglas' death so that the laborers and herders would, at least, be paid [178] as near as we could possibly pay them.

Q. Now, after the death of Simon Douglas did you continue to manage his outfit?

A. I did not.

Q. You ceased your connection with it at the time of his death?

A. Yes sir.

(Testimony of W. E. Robinson.)

Q. Do you know who assumed responsibility for the expense of the labor and supplies?

A. I notified Mr. Cooper, who was 'there, and he had charge from that point.

Q. Did you advise with Mr. Worthington, following the death of Simon Douglas, whether or not they should carry on this outfit?

A. I met them in Great Falls. I happened to be going through Great Falls to Helena. First I talked to them when they came to Lewistown after his death, and they discussed it somewhat at that time, and later I met them in Great Falls when I was going to Helena on other business. That is when Mr. Worthington wanted to go along and talk to Mr. Pigott about the situation with the regional.

Q. You were in the conference that has been described here between Mr. Pigott, and Mr. Worthington and yourself, were you? A. Yes sir.

Q. Do you know that the foreclosure sale, there was notice given of the foreclosure sale?

A. Yes sir.

Q. Prior to the foreclosure sale did you make efforts to try to sell the outfit as a whole?

A. I tried to arrange to have it bid at the sale.

Q. What?

A. To have it bid at the sale. I was trying to line up [179] some prospective buyer or a credit so we could possibly have it bid at the sale.

Q. Describe to the Court what that effort consisted of?

(Testimony of W. E. Robinson.)

A. I talked to Mr. Yeager about the deal.

Q. That is one of the witnesses that was on the stand?

A. Yes sir.

Q. All right, proceed?

A. We went into the matter whether it might be possible for him to buy the sheep. He attempted to get a loan. I understand there are several Yeager brothers, I was, more or less, dealing with George Yeager; he was the main man I was talking with. He in turn attempted to establish a credit so he could take most of the outfit over and was never able to establish this credit so he was unable to make a bid. I had no other outlet for the sheep.

Q. If he had succeeded in getting that loan it was from the P. C. A., he was applying to for that loan, was it?

A. Yes, he was trying to get it from the P. C. A. Whether or not he tried anywhere else, I am not sure.

Q. The deal was, he would get enough of a loan so he would pay off the indebtedness and also pay for the five per cent stock in the P. C. A., is that it?

A. We were trying to establish a bid that would have cleared the indebtedness.

Q. And you failed in that?

A. We failed in that attempt.

Q. When did you finally know you had failed?

A. Shortly on the afternoon of the day of the sale.

(Testimony of W. E. Robinson.)

Q. Did you attend the sale?

A. I got there a little late. I believe the sale had actually started before I got there or it had just started. [180] I didn't go into the shed when I first got there where they were holding the sale.

Q. You observed the conduct of the sale, did you? A. Yes sir.

Q. Will you describe the conduct of the sale to the Court, as to whether it was fair, or not, as to efforts to get bids and so on?

Mr. DeKalb: That would be calling for a conclusion of the witness, with respect to its fairness.

The Court: Yes, I think so.

Q. Did you go in later?

A. I went in later. I was not at the sale long enough to form an opinion.

Q. What was the condition of the sheep in the Simon Douglas outfit at the time of the sale?

A. I was not in the shed long enough to look at the sheep. I didn't see them at that time. I saw the sheep,—I made one trip up to the ranch and they were in fair condition.

Q. How was the herd as to ages of ewes?

A. I never mouthed the sheep, and my knowledge of their ages was based mostly on what Mr. Douglas had told me about them, the same as that reported.

Q. I call your attention to the application for the loan, dated November twenty-seventh, 1934, Defendant's Exhibit "9", and to the number of year-

(Testimony of W. E. Robinson.)

ling ewes and twos and threes, shown in that application, with relation to those of older age, and ask you whether that is a well balanced herd?

A. It runs a little bit to the aged side.

Q. To the aged side? A. Yes sir. [181]

Q. What happens to a herd like that?

A. I don't understand the question.

Q. As the bids go up?

A. Some of them are too old.

Q. Were you familiar with the market value of sheep in Fergus County in February, 1935?

A. I believe so.

Q. You have heard the evidence here to the effect that these 1453 ewe lambs sold for \$4.10 a head, have you not? A. Yes sir.

Q. Will you tell the Court what in your opinion was the fair market value of ewe lambs of that description in February, 1935 in Fergus County?

A. I felt that the ewe lambs sold for all they were worth. I base ewe lambs the same as every one does. The price of lambs is equal to the price of yearlings, and on that basis the ewe lamb would be worth from \$4.00 to \$4.50, possibly a slight premium, on account of the wintering that had been put into them.

Q. Describe that formula further, will you?

A. These lambs were not particularly big lambs. I weighed the wether lambs at the time they were sold. They weighed in the neighborhood of 61 pounds. Ewe lambs as a rule run a little lighter.

(Testimony of W. E. Robinson.)

Very often they shrink after being weaned from their mothers, unless fed extra well. I suppose the ewe lambs weighed somewhere around 55 to 57 pounds, and I think the price of \$4.10 is a big price for a lamb of that weight, a very good price.

Q. How does it compare with what Simon Douglas sold his wether lambs for in the fall of 1934?

[182]

Mr. DeKalb: We object to that as too remote. It is a sale under different conditions.

The Court: I think so.

Q. How did the market in February, 1935 compare with the market in the fall of 1934?

A. Well, I don't remember but the Chicago market will show for itself.

Q. You don't remember then?

A. No sir.

Q. I call your attention to the sale to O. A. Nepstad of 1080 head of ewes at \$2.25 a head, and to the testimony with respect to their classification, that there were 4 yearlings in the band and 22 twos, 68 threes, 185 fours, 347 fives and 422 classified as aged. I will ask you what in your opinion was the fair market value per head of a band of ewes of that character?

A. I believe it was a very fair value under the conditions and circumstances at the time.

Q. These prices that were received for them?

A. Yes sir.

(Testimony of W. E. Robinson.)

Q. What effect, if any, did the sale, the program of the United States Government in the fall of 1934 have on the price of old ewes?

A. Well, every one considered the price paid by the Government was excessive for old ewes, above the market.

Q. Calling your attention to the sale of 1238 ewes to Henry Lingshire at \$3.40 a head, and to the description of them which is in evidence, there were 20 yearlings, 203 twos, 423 threes, 240 fours, 205 fives, and 122 aged, and I will ask you what in your opinion was the fair market value per head of such a band of ewes? [183]

A. I believe it was a fair value because it was more than I could pay.

Q. \$3.40? A. Yes sir.

Q. More than you would have paid, if you had been in funds?

A. More than I could pay. I had no order. I couldn't handle them at that price.

Q. I understand your opinion is that was in excess of the fair market price?

A. I think it was a fair price for the ewes.

Q. I call your attention to the sale of 308 sacks of molasses cake at \$1.30 a sack, and I will ask you whether you had an opinion as to the fair value of molasses cake in February, 1935 in Fergus County?

A. I bought and paid for twenty tons which was shipped out there at a cost of \$43.00 a ton from the Montana Flour Mills.

(Testimony of W. E. Robinson.)

Q. When was that?

A. It was between the first and twentieth of December; it was shortly after I received the power-of-attorney. It cost \$43.00 a ton.

Q. Was there any difference in the market for molasses cake in February, 1935 as compared to what you knew about it?

A. From the elevator company?

Q. Yes?

A. I don't know. I don't know what the elevator company asked for it.

Q. In your opinion what was the fair value of that molasses cake at the time and place of the sale?

A. That would all depend on the demand. You either want it or you don't want it. Most men at that time of the year had purchased feed supplies for the winter, and perhaps [184] not as many people wanted the cake at that time as you would find earlier in the fall.

Cross Examination

By Mr. DeKalb:

Q. I take it that as soon as Simon Douglas expired you were advised, of course, that your authority under the power-of-attorney had ceased?

A. Yes sir.

Q. You didn't attempt to exercise any further powers under that power-of-attorney?

A. No.

(Testimony of W. E. Robinson.)

Q. Did you follow up this Nepstad sale in any way? Do you know anything about if those sheep were sold a few days afterwards?

A. No sir. I had no connection with them.

Q. You were acquainted with George Yeager?

A. Yes sir.

Q. You were endeavoring to work out for George Yeager a purchase, work out the finances with which to purchase—?

A. With which to bid.

Q. These sheep, is that right?

A. We were trying to get some money together to make a bid.

Q. To get some money to bid. The final wash-up of it was that you were to dig up yourself in some way two thousand dollars of those funds. That was one of the final proposals, was it not?

A. That was the final proposal. The first one fell down, and then I offered to advance two thousand dollars on the deal, yes.

Q. You and Yeager acquainted yourselves with the value of this spread out there so you could act intelligently in putting it over, didn't you? [185]

A. Mr. Yeager inspected the sheep to his satisfaction. I never mouthed the sheep.

Q. You would have been in on the deal if it had been made, financially interested to the tune of two thousand dollars, would you not?

A. Not necessarily in the deal. I was willing to loan Yeager brothers two thousand dollars.

(Testimony of W. E. Robinson.)

Q. Well, you were counseling with him concerning the advisability of making this purchase?

A. Yes sir.

Q. And you and he put your heads together and you figured out what he could afford to pay for that bunch of sheep, the whole business?

A. Subject to his inspection of the sheep.

Q. And which he had satisfied himself about?

A. Yes sir.

Q. You were trying to arrange it so he could get to this sale, and if necessary pay for that band of sheep, \$18,400.00, that is a fact, is it not?

A. It was in the neighborhood of eighteen thousand dollars, I don't remember the exact amount. He was taking most of the lay out, not just the sheep.

Q. And then a thousand dollars was to be added to that for equipment that he was not going to buy on the basis of \$18,500.00?

A. He was going to add the extra thousand.

Q. Well, he was figuring on paying a thousand dollars more. You were going to put up some of that, were you not?

A. I don't remember that. I understood the equipment was in the deal. [186]

Q. All right, now, you men had passed judgment just a few days before the sale or a short time before the sale, and you, as Mr. Douglas' manager, were familiar with those sheep on the price of \$18,500.00, were you not?

(Testimony of W. E. Robinson.)

A. Not just the sheep, it was on the entire equipment.

Q. All right, let's put the whole business in at \$18,500.00. Were the horses in there?

A. I don't think so.

Q. The horses, at least, were out of the deal?

A. So far as I remember, they were.

Q. You fellows at that time, it was your judgment that those sheep had a value of \$18,500.00?

A. Well, it was mostly Mr. Yeager's judgment on the sheep.

Q. Is it not a fact, that you and Mr. Yeager pushed your pencils on this bunch of sheep and figured out at \$20,000.00 there would still be a profit on those sheep?

A. I don't remember ever figuring it up to \$20,000.00.

Q. Let me ask you, if the figures you used at that time you didn't figure on the wool which had a market at that time, wool was being consigned?

A. It was all based on what the future might have. The Yeagers agreed to furnish most of the labor which would eliminate most of the expense.

Q. You figured out, the two of you, a deal in which you would both be interested to some extent where you would have those sheep after the wool was marketed, and the lambs, the prospective lambs were marketed, you would have those sheep as an investment, this band of sheep practically intact, after carrying on through the years, as far as they

(Testimony of W. E. Robinson.)

would go, at about \$11,000.00, is that not a fact?

[187]

A. I don't remember how that figured out.

Q. You do remember however that you men figured this out, and where, if you could get hold of the money, where you could spring the deal, were willing to go out there and pay as much as \$18,500.00 for those sheep, that is a fact is it not?

A. I think we were trying to figure nearer \$18,000.00 than we were \$18,500.00.

Q. That was a sum in excess of the amount of the indebtedness? A. Yes sir.

Q. Considerably in excess of the amount of the indebtedness?

A. We were figuring on paying the amount of the indebtedness.

Q. Taking your expression here about a fair price. You don't mean it was a top price or anything of that kind. You just say it was a fair price. You don't assume to say that in the judgment of sheep men, men who are experienced in the handling and buying and selling of sheep that price was an adequate price, do you?

A. What is the question?

Q. I will withdraw the question. The price that you men were willing to pay you considered a reasonable price for the stuff, did you?

A. Under the circumstances, it was a going concern and perhaps worth more money to Mr. Yeager than it was to the men that would have to pay cash

(Testimony of W. E. Robinson.)

and additional freight to take it away from there, that is true.

Q. You were not figuring on losing any money in making the deal for these sheep, were you?

A. You understand if there had been any lost Mr. Yeager, he would have done the losing, and if there was any gain, [188] he would have done the gaining.

Q. You don't know of any losses that were sustained by anybody in connection with this deal, except the creditors and heirs of the Douglas estate, do you?

A. The Regional I understand took a loss.

Q. And they have filed a claim against the estate, haven't they? A. I don't know.

Q. Do you know Daley Johnson?

A. Yes sir.

Q. Do you know whether or not it is a fact that he made an offer to take over that whole spread for what was against it? A. I do not.

Q. In your discussions of this prospective deal with Yeager you did not express to him any such view that those 1453 or 1080 ewes were worth \$2.25 a head, did you?

A. We figured all the time we would try and buy them as cheap as we could.

Q. Sure.

A. And this \$18,000.00 item was, more or less, as I remember it, our outside figure, as the outside limit.

(Testimony of W. E. Robinson.)

Q. You tried to borrow that much money?

A. Sure but we couldn't spend any more than we could borrow.

Q. What did you in your discussions, we will get at it that way, your discussions with Mr. Yeager put as a value on those 1080 head of ewes, what figure they were worth?

A. I haven't any figures on that. We did figure if we had the money that the set-up, the set-up on the ranch were perhaps worth more to him than to lots of people; he would not have the expense. He could step right in and go to work.

Q. That is what makes a market price; that is what gives [189] value to things somebody wants, is it not?

A. I always figured it is what somebody would pay for a thing.

Q. You are figuring the cost, if there was a sale in midwinter on a raw day, under conditions perhaps caused by some statements and expressions that were made, at least, to the persons conducting the sale, you consider whatever was bought under those conditions would represent the market value, is that what you base it on?

A. No, I base it on this. I couldn't buy the sheep, and I figure the man that did buy them at the top price perhaps was the market.

Q. You didn't have anybody qualify to make a bid there at that time? A. No sir.

(Testimony of W. E. Robinson.)

Q. That has been your chief function at these sales, is to represent a client and make a bid within the orders of the client, has it not?

A. I don't attend very many public sales.

Q. You say you got there late?

A. I believe the sale was on. I talked with somebody at the car when I first drove up, I didn't go into the sale immediately. I didn't have anything to go in there for so I didn't go in.

Q. Let's get down to the matter of oil cake. You bought that oil cake at \$43.00 a ton?

A. Yes sir.

Q. So far as your recollection is concerned, that was not more than two or three weeks before this date, was it?

A. They needed some concentrates out there pretty badly and I bought them very shortly after I was given the power of attorney. [190]

Q. That would be between the twenty-second of December and the date of his death, or January twelfth?

A. They were bought the next few days afterwards.

Q. That oil cake was kept under cover, was it not?

A. Well, Tom White had charge of the oil cake, and I presume it was.

Q. It deteriorated in value from \$43.00 a ton to \$26.00 a ton on the day of this sale; that is what it brought at the sale, according to the figures. Do

(Testimony of W. E. Robinson.)

you know any reason for that, except a sacrifice sale of something of that sort?

A. The only reason I know was, nobody wanted it.

Q. Oil cake had a value on the market, didn't it?

A. That was the elevator price.

Q. That was the elevator price. It didn't fluctuate very much, did it?

A. I never bought oil cake before or since, I don't know.

Q. A man experienced with sheep would know about how the current price runs on oil cake, would he not?

A. I hear the sheep men that run sheep discuss it from time to time but I don't follow it very close.

Q. Oil cake has a stable price? A. Yes.

Q. And depending on where you are, but in Fergus County the price of oil cake sits right at \$43.00 a ton, does it?

A. Some years it is higher than others.

Q. Yes. Here was a fluctuation from \$43.00 to \$26.00 a ton within a matter of about a month.

A. No answer.

Redirect Examination

By Mr. Van Cott:

Q. I will call your attention to this document and ask you [191] if that refreshes your recollection as to the date of the purchase of the oil cake and molasses cake? A. Yes sir.

(Testimony of W. E. Robinson.)

Q. What was the date? A. December 21st.

Q. Now, you stated that the person who buys the outfit as a unit gets with the unit a going concern value. Will you please explain what you mean by that?

A. I mean that the Yeager Brothers had they been able to buy the sheep could have taken them right where they were without any cost of moving them; without any extra freight. The plant was going and in operation. If they had been the successful bidders they could have taken them over with smaller effort than anybody else. Therefore, they might have been able to bid more than the other man because they would not have the extra expense incurred.

Q. That going concern value referred to is one of the values that is lost when there is necessity of selling the outfit in parcels, is that correct?

A. Naturally.

Q. Is that the difference between the cash value of the parcels of an outfit and the loan value on an operating basis?

A. I don't understand the question.

Q. Are there difference between the cash value of the parcels of an outfit, sold in parcels, and the appraised value for an operating loan?

A. I don't know. I am not in the loan business. I deal strictly on a cash basis.

Mr. Van Cott: That is all.

Witness Excused. [192]

WILLIAM RAGAN,

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. William Ragan.

Q. Where do you live? A. Townsend.

Q. What is your occupation?

A. Livestock feeder.

Q. What do you do in the livestock business?

A. Buy and sell.

Q. How long have you been doing that?

A. Twenty-five years.

Q. Were you present at the sale of the Simon Douglas outfit? A. Yes sir.

Q. What was your purpose in going there?

A. To buy some sheep.

Q. Did you bid on sheep there?

A. Yes sir.

Q. On what list did you bid?

A. I bid on all of them, that is, the three bands.

Q. That is the lambs and two bands of ewes?

A. Yes sir.

Q. How high did you go on the bidding on the lambs? A. I think it was \$3.50.

Q. Why did you stop?

A. Well, I didn't think they were worth any more. I didn't think I could make any money on them buying in high.

(Testimony of William Ragan.)

Q. You dropped out at \$3.50 and the sale was \$4.10? A. Yes sir.

Q. Have you an opinion as to the fair market value of those lambs in Fergus County on February fifth, 1935? A. I think so.

Q. What in your opinion was the fair market value? [193]

A. I think about \$3.50 a head.

Q. Did you bid on the small band of ewes the band of ewes that had 1080 in it? A. Yes sir.

Q. That is the one that was sold to O. A. Nepstad for \$2.25. What was the highest bid that you made?

A. I don't exactly recall but I think it was around \$2.00.

Q. Why did you stop at that point?

A. I thought they were high enough.

Q. Have you an opinion as to the fair market value of that band of ewes sold to O. A. Nepstad at \$2.25? A. Yes, I think so.

Q. What in your opinion was the fair market value?

A. I figured around \$2.00 a head to me.

Q. And the band of ewes consisting of 1238, did you make a bid on them? A. Yes sir.

Q. What was your highest bid there?

Mr. DeKalb: I object to what his highest bid was.

Q. Well, what bid did you make?

A. \$3.40 was the last bid.

(Testimony of William Ragan.)

Q. You were the successful bidder?

A. Yes sir.

Q. You were bidding for yourself and Henry Lingshire, were you?

A. We were buying them together.

Q. Did you observe the conduct of the sale throughout? A. Yes sir.

Q. Will you describe the conduct of the sale to the Court?

A. Well, the sheep were offered in different bands and auctioned off like any other auction sale.

Q. Did you hear of any threats being made about the legality of the sale? [194]

A. I heard some talk but I didn't hear it directly and I didn't pay much attention to it.

Q. Did it affect you in your bidding?

A. No sir.

Cross Examination

By Mr. DeKalb:

Q. You got 1238 head for \$3.40 bid for you and Mr. Lingshire?

A. That is right. I don't remember the exact number, 1237 something like that.

Q. Well, around about that. It is reported in the return of the sale at 1238. You say you were buying and selling sheep, that is your business?

A. Yes sir.

Q. You sold that band, did you not?

A. Yes sir.

(Testimony of William Ragan.)

Q. A few days after the purchase?

A. That is correct.

Q. At a profit of Eighty Cents a head?

A. I sold them for \$4.25.

Q. You got them for \$3.40? A. Correct.

Mr. DeKalb: That is all.

Re-Direct Examination

By Mr. Van Cott:

Q. To whom did you sell these sheep for \$4.25?

A. Mr. Ebert.

Q. How were you able to make that sale?

A. I knew he was buying some ewes of that kind at that time and I got busy and got him on the telephone and got him over there.

Q. He was not at the sale? A. No. sir.

Q. I should have asked this question before on direct [195] examination, of the young sheep in the band you bought, state whether or not any of them were cut-backs?

A. I figured the young sheep in there was the poorest in there for quality.

Q. What do you mean,—well, in what respects?

A. They looked like they grew up from cut-back lambs.

Q. What do you mean?

A. Well lambs that would not be big enough to go in the fall.

Witness Excused.

DALEY JOHNSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name? A. Daley Johnson.

Q. Where do you reside?

A. Melville, Montana.

Q. What is your occupation?

A. I am a rancher.

Q. How long have you been engaged in that business?

A. In the ranching business, I don't know—more or less, all my life.

Q. Did you attend the sale of the Simon Douglas outfit? A. I did.

Q. For what purpose did you go there?

A. I went there to buy sheep.

Q. Did you make any bids? A. I did.

Q. What did you bid on?

A. I bid on the first band of sheep that come up, the yearling ewes?

Q. That is the larger band of ewes?

A. No, the yearling ewes. [196]

Q. That is the lambs?

A. Yes, they were coming yearlings.

Q. You were the successful bidder on them at \$4.10, were you? A. I was.

Q. Did you bid on anything else, except them?

A. No, I didn't.

(Testimony of Daley Johnson.)

Q. You are a son-in-law of O. A. Nepstad?

A. Yes sir.

Q. He was present at the sale, was he?

A. He was.

Q. He made a bid on the small band of ewes?

A. Yes sir.

Q. At \$2.25 a head? A. I think so.

Q. That was the successful bid, was it?

A. That was the successful bid.

Q. Do you know what disposition he made of those ewes? A. They were sold.

Q. To whom?

A. They were sold to Frank Birkinbine.

Q. The man who testified here this morning?

A. Yes sir.

Q. What were the terms of that sale?

A. Well, I just can't remember that. There were two prices. The older ewes went at one price and the younger ewes went at another price and I don't know either price.

Q. Can you recall what profit was made on the deal by Mr. Nepstad?

A. Mr. Nepstad and I were in together and we divided \$800.00 between us.

Q. That is, after buying them at \$2.25 and then selling them? [197]

A. Well, eventually. We didn't get *out* money out of these sheep until the following fall, September or October, the next year.

(Testimony of Daley Johnson.)

Q. So this profit you got was a credit proposition that you didn't realize on until the next fall?

A. Yes sir.

Cross Examination

By Mr. DeKalb:

Q. You got interest on it in the meantime, did you not? A. No.

Q. It was sold without interest? A. Yes.

Q. You extended credit without interest?

A. The way the deal was, these sheep were sold to Mr. Birkinbine, as he told you this morning, and they bounced around the country two or three days before they landed, and the price we received for the sheep was not paid until the sheep were re-sold and re-sold along in September or October the same year following.

Q. Did you discuss this with anybody before the sale, the purchase of the sheep before the sale?

A. I was told about the sale by Mr. Robinson who just testified.

Q. Did you discuss what you were going to do or expected to do, after the sale with him?

A. I don't know as I did. I talked with him at some length about everything. The chances are we discussed those things but they are of no importance. I can't recall any specific thing that was said.

Q. You don't recall discussing with him, or with anybody, and in that discussion making the state-

(Testimony of Daley Johnson.)

ment that you [198] would offer to take over the whole spread for what was against it?

A. Yes, I would have. If we had the money I would have bought that outfit as it stood.

Q. You figured if you bought it for what was against it, some thousand dollars more than it brought, you would have made some money off it, you figured it that way, did you not?

A. Yes, I guess so.

Q. You were not going to buy it if you thought you were going to take a loss, were you?

A. No.

Q. You figured it was worth more money than what there was against it, is that correct?

A. Well, yes.

Q. And if you had the money you would have made a bid of that kind on it? A. Yes sir.

Mr. DeKalb: That is all.

Redirect Examination

By Mr. Van Cott:

Q. You thought if you got the outfit on those terms you would be able to operate it with a profit, is that it?

A. Yes. No, I would not have stayed there and operated that outfit very long. Conditions were changing and it looked to me like things were on the up-grade. There was the possibility of a profit

(Testimony of Daley Johnson.)

in there with a lot of hard work and grief and taking some chances.

Q. What kind of a chance?

A. Weather and markets.

Q. You figured if you got in there and took your chance on the market and weather, and put in a lot of hard work you probably could make a profit?

A. I was satisfied I might. [199]

Q. When did you state to any one you would be willing to do that?

A. I don't recall just when it was but I remember I spoke to Mr. Robinson.

Q. When with reference to the date of the sale?

A. I think it was probably at the sale or previous, I don't know.

Q. To whom did you make the statement?

A. Mr. Robinson.

Q. You didn't have the cash to buy it?

A. No.

Q. You heard the testimony of Mr. Cooper that he offered it for sale?

A. Yes sir.

Q. As a unit?

A. Yes sir.

Q. If you had the cash you could have bought it at that time, couldn't you?

A. I didn't hear him offer it.

Q. If he did, you could have?

A. Yes sir.

Q. What you wanted was credit?

A. Yes sir.

Q. You didn't ask for the credit until you reached there the day of the sale, did you?

(Testimony of Daley Johnson.)

A. I had not applied. I didn't have that much money, and I had not applied to anybody for it because I didn't know the sale was coming up. I was not prepared to buy anything except about one band of sheep.

Recross Examination

By Mr. DeKalb:

Q. This Robinson you talked to was the Robinson who conducted the sale? A. Yes sir.

Q. That was W. E. Robinson of Lewistown, was it not? A. I talked to both of them.

Witness Excused. [200]

M. W. WILDSCHULTS

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name?

A. M. W. Wildschults.

Q. Where do you reside?

A. Lewistown, Montana.

Q. What is your occupation?

A. Dealing in livestock.

Q. Was it such in February, 1935?

A. Yes sir.

(Testimony of M. W. Wildschults.)

Q. Did you attend the sale of the Simon Douglas outfit? A. I did.

Q. For what purpose?

A. I was going to buy some horses, and anything that was cheap.

Q. Buy sheep, if they were cheap enough?

A. Buy sheep, if they were cheap enough.

Q. Were you prepared to pay cash for whatever you bid on? A. Yes sir.

Q. What did you bid on?

A. On that ten and some bunch of ewes.

Q. The smaller bunch of ewes?

A. The smaller bunch of ewes.

Q. How high did you go on them?

A. They sold for \$2.25. My bid was five or ten cents below that.

Q. Why did you quit?

A. That was all I cared to go.

Q. Did you bid on anything else?

A. I bid the horses.

Q. The record shows you bid 21 horses for \$360.00? A. Yes sir. [201]

Q. What did you do with them?

A. I re-sold them.

Q. In a lot or in parcels?

A. In parcels.

Q. Over what period of time?

A. I think I had most of them sold in a month or two.

(Testimony of M. W. Wildschults.)

Q. How did you come out?

A. I lost \$50.00.

Q. Did you notice the conduct of the sale?

A. Yes sir.

Q. How was it? A. Very good.

Q. Did you hear anybody making any threats about the legality of the sale?

A. I didn't hear it directly. I heard it indirectly.

Q. Did you pay any attention to it?

A. No sir.

Mr. Van Cott: That is all.

Mr. DeKalb: No cross examination.

Witness excused. [202]

JOHN G. CAMERON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name?

A. John G. Cameron.

Q. Where do you reside?

A. Great Falls.

Q. What is your occupation?

A. I am in the livestock loan department of the Montana Bank and Trust Company.

Q. What was your occupation in February, 1935?

(Testimony of John G. Cameron.)

A. I was Secretary and Manager of the Stockmens Finance Corporation at Cascade, Montana.

Q. Was R. I. Balch a borrower of that concern?

A. Yes sir.

Q. Borrowed on the security of chattel mortgages on sheep? A. Yes sir.

Q. Did you attend the sale of Simon Douglas outfit? A. Yes sir.

Q. With whom did you go there?

A. With Robert Balch.

Q. What was your purpose of going there?

A. I attended the sale at Mr. Balch's request.

Q. Mr. Balch was going there as a bidder, was he? A. Yes sir.

Q. If he had been a successful bidder you would have financed it, would you? A. Yes sir.

Q. That was the understanding?

A. Yes sir.

Q. Did you observe the sale?

A. Yes sir.

Q. How was it conducted?

A. I thought the livestock was offered for sale in an attractive way. They were offered in lots; that would [203] be attractive to the average purchaser.

Q. Was time given to bidders to make their calculations? A. Yes sir.

Q. Plenty of time? A. Ample time.

Q. Ample time to make investigation, if desired?

A. Yes sir.

(Testimony of John G. Cameron.)

Q. I call your attention to the sale of lambs at \$4.10 per head. Were you familiar with the market value of lambs and sheep in Fergus County, Montana in February, 1935?

A. I would say fairly well, yes.

Q. What in your opinion was the fair market value of those lambs at that time and place?

A. I base my opinion on them on the weight of the lambs, around six to seven cents a pound.

Q. What would that——?

A. I estimated the lambs to weigh under sixty pounds.

Q. What would that make those lambs come to?

A. Between \$3.50 and \$4.00.

Q. That is your opinion of the fair market value at that time? A. Yes sir.

Q. I call your attention to the sale of the small band of ewes at \$2.25 per head. In your opinion what was the fair market value of those ewes in Fergus County, Montana in February? Have you the band of ewes in mind? A. Yes sir.

Q. They consisted of 4 yearlings, 22 two years old, 68 three years old, 185 four years old, 347 five years old and 422 aged. Have you an opinion as to the fair market value of those ewes?

A. I think the young ewes in there was a little under size. [204] They were not as desirable in quality as the older ewes. Neither Mr. Balch nor myself were interested in that particular band.

(Testimony of John G. Cameron.)

They were aged and I didn't give them much consideration.

Q. The other band, do you have an opinion as to the market value of that band, the other band that had more of the younger sheep in it, the one that sold for \$3.40 a head, do you have an opinion as to the fair market value of that?

A. Averaging out the classifications of the band, I would say around \$3.00 to \$3.50.

Cross Examination

By Mr. DeKalb:

Q. Where did you say your headquarters are, Choteau? A. Great Falls.

Q. Did you ever attend any sales in Fergus County before? A. No sir.

Q. That is your first trip out in that country?

A. That was the first time I was out there.

Q. Did you arrive there before the sale had started? A. Yes sir.

Q. How long before?

A. We left Lewistown that morning, I think we arrived there about ten or eleven o'clock.

Q. The sale started at two? A. Yes sir.

Q. What did you do in the meantime after arriving there?

A. We walked around the place and looked at the stock; as I remember, the sheep were coming in there; the last band came in around noon.

(Testimony of John G. Cameron.)

Q. Did you see any of them mouthed? [205]

A. I think I mouthed about twenty-five head to get an idea what they were.

Q. Did Mr. Balch, that was interested in buying?
A. Yes sir.

Q. Why did you accompany him?

A. I was indirectly interested to the extent of wishing to make Mr. Balch a loan to purchase these sheep.

Q. If he had bought those sheep at the price you thought they should be bought for you would have financed him, would you?

A. I was not really concerned what he paid for the sheep. We were ready to finance the loan.

Q. On the basis of a chattel mortgage to you?

A. A chattel mortgage.

Q. In making a loan of that kind, I presume you don't loan a man one hundred per cent of the value, do you?
A. No sir.

Q. You hold that down to about thirty to forty per cent on livestock, do you not, or less?

A. Probably fifty to seventy per cent.

Q. So that you were looking at these values practically from the standpoint of loan values, were you not?

A. Well, Mr. Balch had sufficient cash to make an attractive loan, and our company would have had a good loan.

(Testimony of John G. Cameron.)

Q. He would have put some cash into the proposition? A. Yes, he would.

Q. So anything he would have bought there you would have taken a mortgage on it for approximately what you have stated you keep your percentages to? A. Yes sir.

Witness excused. [206]

R. I. BALCH

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name?

A. My name, R. I. Balch.

Q. Where do you reside?

A. Near Cascade.

Q. What is your occupation?

A. I am a stock man.

Q. How long have you been engaged in that occupation?

A. Since I have been at Cascade, for the last twenty years.

Q. You are the Mr. Balch referred to by Mr. Cameron who was just on the stand?

A. I am.

(Testimony of R. I. Balch.)

Q. You went with Mr. Cameron to the Simon Douglas sale, did you?

A. Well, he went with me.

Q. Were you adequately financed to buy anything you desired to at that sale?

A. Yes sir.

Q. Mr. Cameron was ready to loan you any money that you needed, is that right?

A. Yes sir.

Q. You were not limited to forty per cent of the value, were you? A. No sir.

Q. Did you make any bids? A. I did.

Q. What was the first lot you bid on?

A. The first lot I bid on was what was known as the young band or larger band. It was the second bunch that was sold, I believe.

Q. What was your bid?

A. If I am correct, I think I was the next bidder to the man that bought the sheep.

Q. The record shows they sold for \$3.40?

A. My bid would have been \$3.30 or \$3.35.

Q. Why did you quit? [207]

A. Well, they got as high as I wanted to go.

Q. What else did you bid on?

A. I placed a bid I think on the ewe lambs.

Q. What was your bid on those?

A. I don't remember that but I know they got higher than I wanted and I was not interested and I dropped out, and I was not a bidder at the latter part of the sale.

(Testimony of R. I. Balch.)

Q. What was the condition of what they called the old band of ewes, the physical condition?

A. Well, to me their condition was poor.

Q. Is that why you didn't bid on those?

A. Well, I don't like old sheep any way, and that is one reason why, yes.

Q. Did you observe the conduct of the sale that day? A. Yes sir.

Q. Did you hear any threats about the sale being illegal? A. No.

Q. You were not affected by that?

A. No sir.

Mr. Van Cott: That is all.

Mr. DeKalb: No cross examination.

Mr. Van Cott: Take the stand again.

Q. Following this sale, did you make a purchase of ewes in the vicinity of Lewistown? A. No.

Q. Did you any place?

A. Yes, I did buy some ewes about a month later.

Q. How many did you buy?

A. I can't remember the exact amount. It was a band approximately from ten to twelve hundred.

Q. Describe the ewes in that band?

A. The ewes in that band were straight threes and fours. [208]

Q. What was their condition as to flesh?

A. Very good.

Q. How did this band compare in age and con-

(Testimony of R. I. Balch.)

dition with the band you made the unsuccessful bid of \$3.30 on?

A. I didn't have the opportunity to go through the band at Lewistown, and I went through the band I bought and knew what I was buying, and they were bigger and better ewes; they were threes and fours.

Q. Were you given an opportunity of sorting them?

A. Yes, I mouthed out these I didn't want.

Q. What did you have to pay for those?

A. Well, I can't remember that exact figure but it runs in my mind it was \$3.60 to \$3.75, f. o. b. yards at Blackfeet, Montana.

Q. \$3.60 to \$3.75? A. \$3.60 to \$3.75.

Cross Examination

By Mr. DeKalb:

Q. Who did you buy them from?

A. I bought them from Lampen, was the man that sold them to me. I think they call themselves the Pondera Sheep Company or Glacier Sheep Company, and Mr. Lampen in Great Falls, of the Great Falls Building & Loan sold them to me.

Q. Were they doing business over here the same as at Lewistown? A. At Lewistown?

Q. Yes? A. No.

Q. Whereabouts? A. At Blackfoot.

Mr. DeKalb: Well, I move this testimony be

(Testimony of R. I. Balch.)

stricken. I understood the witness to say Lewistown in his testimony in chief. [209]

Mr. Van Cott: May I ask another question?

The Court: Yes.

Redirect Examination

By Mr. Van Cott:

Q. How far is Blackfoot from Lewistown?

A. Well, Blackfoot must be in the neighborhood of I would say, at least, two hundred miles.

Q. What would be the difference, if any, in the value of ewes as compared to their value in Lewistown?

A. Well, to me I don't know how much it would be. There would be some freight difference.

Q. Depending on where you wanted them?

A. I wanted them at my ranch at Cascade, of course.

Mr. Van Cott: I submit, if the Court please, the testimony is competent.

The Court: If you bought them in Fergus County you would trail them home to your ranch?

A. No.

The Court: How far would you have been obliged to ship them?

A. I don't know where they would take them to but they would trail them somewhere fifteen or twenty miles out of Lewistown and they would come to Lewistown. I would not undertake to trail a band

(Testimony of R. I. Balch.)

of sheep that time of the year.

The Court: You have not shown the conditions were the same. I doubt if that is competent. Well, it may stand for what it is worth.

Q. What would be the difference of freight rates in shipping from the Simon Douglas ranch to your place, on the one hand, [210] and from Blackfeet to your place on the other?

A. I can't give you the accurate figure on that but I would estimate probably around ten or twelve cents a head.

Q. Comparing the freight rates between the two places?

A. That is what I mean, ten cents a head difference.

Q. That difference would be a greater rate from Blackfeet or a greater rate from the Simon Douglas ranch?

A. From the Simon Douglas ranch.

Q. You would get them from Blackfeet to your ranch cheaper?

A. Yes, sir, and more direct route; there is no transfer of the cars from one to the other.

Witness Excused

Mr. Van Cott: We rest.

The Court: Any rebuttal?

Mr. DeKalb: I think not. If we may have a recess

(Testimony of R. I. Balch.)

of about three minutes, we will consult.

The Court: Well, we will take a short recess.

After Recess:

Mr. DeKalb: May it please the Court, there is annexed to the Reply in the case a copy of a chattel mortgage, dated in December, 1934. We have a stipulation of Counsel as to its authenticity. I want to offer it in the case just as is. I don't think we need to bother to segregate it from the Reply.

The Court: Very well.

Mr. DeKalb: And we offer that.

The Court: You stipulate that you have no additional evidence? [211]

Mr. Van Cott: That is correct.

Mr. DeKalb: That ends the case, and we are through.

The Court: Well, after the testimony is written up you will need perhaps thirty days on a side, after receiving the transcript of testimony. Is that satisfactory?

Mr. DeKalb: Satisfactory.

Mr. Van Cott: Satisfactory.

The Court: The first brief comes up and reply brief fifteen days?

Mr. DeKalb: Yes, your Honor.

* * * *

[Endorsed]: Filed May 28, 1940. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [212]

Thereafter, on February 20, 1941, a

MEMORANDUM OF DECISION

was duly filed herein, being the the words and figures following, to wit: [213]

[Title of District Court and Cause.]

Herein the plaintiff complains that before his appointment as administrator of the estate of Simon T. Douglas, Deceased, which occurred on April 4th, 1935, and before the appointment of any administrator or executor whatsoever, and after the death of said Simon T. Douglas which took place January 12th, 1935, the defendant, on or about February 5th, 1935, wrongfully took into its possession, sold, alienated, converted and disposed of to its own use certain personal property and effects of said decedent, set forth in the amended complaint, of which said Simon T. Douglas up to the time of his death, and his estate and plaintiff since that time, was and were lawfully possessed, of the value of \$35,500.20, and to the damage of the estate in double that value, all of which is alleged to be contrary to the provisions of Section 10140 Revised Codes of Montana, reading as follows: "If any person, before the granting of letters testamentary or of administration embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Defendant denies the foregoing, except admitting the appointment of administrator. Then follows a lengthy recitation in a further answer, affirmative defense and cross complaint; that the defendant is duly organized and existing under and by virtue of Section 201 (e) of an act of Congress known as the Emergency Relief and Construction Act of 1932 (12 U. S. C. A. Sec. 1148) and has its principal place of business in the city of Helena, State [214] of Montana, and that it is an instrumentality of the United States Government; that all of the capital stock of the defendant corporation and all its property, including the note and mortgage involved herein, are beneficially owned by the United States, and that the corporation, under the authority conferred, has been engaged in the business of making loans on livestock and other personal property and taking notes and chattel mortgages as security therefor.

That on December 27th, 1933, said Douglas executed his promissory note to the defendant in the sum of \$17,000.00, due December 15th, 1934, and to secure the payment thereof and any additional advances, if any, not in excess of \$20,000.00, he executed and delivered to defendant, as mortgagee, his certain chattel mortgage, bearing said date, covering the livestock and other personal property therein described; that said mortgage was duly and regularly signed and acknowledged by said Douglas, and had endorsed thereon a written receipt by him

showing that a true copy of said mortgage has been delivered to him; there was also attached the required affidavit on behalf of the mortgagee, and the mortgage was filed in the office of the County Clerk of Fergus County, Montana, on January 8th, 1934.

That the said indebtedness was not paid at maturity, and on or about November 27th, 1934, said Simon Douglas made written application to defendant for a renewal and continuation of said mortgage indebtedness, and pursuant thereto executed a new note dated December 19th, 1934, and likewise a new chattel mortgage of even date therewith as security therefor, which was filed in the office of the County Clerk of Fergus County, Montana, on December 28th, 1934. It appears that no money was ever loaned and no advances ever made under the renewal loan because of the death of said Simon Douglas, who died intestate in Fergus County, Montana, on January 12th, 1935. It further appears that in making such loans the custom and procedure followed was to submit them for approval to the local counsel of defendant before they could be closed or completed. Defendant alleges that immediately after the [215] death of Simon Douglas it was necessary to employ help to care for and preserve the personal property described in the chattel mortgage dated December 27th, 1933, "for the reason that no heir of said Simon Douglas, nor any personal representative of his, nor any other person,

assumed or pretended to care for, protect or preserve such security, and that no person was appointed administrator of the estate of said deceased until on or about the 9th day of April, 1935." That on the date of his death said Simon Douglas was indebted to defendant in the sum of \$16,328.48, inclusive of interest at the rate of 6½ per cent per annum. Defendant alleges that in order to protect its security and the interests of the estate and in pursuance of the power of sale contained in the mortgage, the property therein described was sold at public auction to the highest bidder on February 5th, 1935, in accordance with the terms of said mortgage and as provided by statute; that the total gross amount received for the property at such sale was \$15,002.10, which defendant alleges "was and is the real and market value of said mortgaged property and all thereof on said date." That there was a balance of \$1694.64 owing defendant on the chattel mortgage indebtedness which was presented to the plaintiff herein as administrator of the Simon Douglas estate, and was not allowed, and judgment is asked on this amount, against plaintiff, with interest thereon at 6½% from February 5th, 1935, until paid.

Because of the strong reliance placed upon it by defendant in support of its contentions, the first case to be considered will be that of *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621, relative to the survival of the power of sale contained in a mortgage

after the death of the mortgagor, followed by other authorities of material interest in dealing with the theories and arguments of counsel. Whether the power of sale which was contained in the aforesaid chattel mortgage survived the death of the mortgagor seems to depend upon whether it was a power coupled with an interest.

In *Bell S. & C. M. Co. v. First National Bank*, 156 U. S. 470, 15 Sup. Ct. 440, 39 L. Ed. 497, cited in the Muth case, it was [216] held, in reviewing and affirming said case, found in 8 Mont. 32, 19 Pac. 403, that: "That power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property to obtain payment of the indebtedness." The Montana Supreme Court said in the above case, which was affirmed as above noted: "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable."

As to the query, whether the power is one coupled with an interest and thereby survives the death of the grantor, Chief Justice Marshall held in *Hunt v.*

Rousmanier's Administrators, 8 Wheat. 174, 5 L. Ed. 589: "We hold to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to impart this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest."

Another well reasoned case, cited in the Muth case, is that of *Bergen v. Bennett*, 2 Am. Dec. 281, which held: "It is admitted that anaked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion, the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land." Would not the power of sale contained in the chattel mortgage in [217] question be governed by the same rules as those applied in a mortgage of real estate, and should not the power of sale be held to be coupled with an interest irrespective of whether it applied to the one or the

other. Does it not clearly appear that the interest involved in the power of sale whether contained in a mortgage of personalty or of realty is identical in effect, and would have to be construed as a power coupled with an interest, in either case.

In 2 Corpus Juris, page 1175, Sec. 86, the following appears: "Although ordinarily an agency is determined by the death of the principal, yet where the authority given the agent is auxiliary to an interest in the subject matter of the power, as considered in Sec. 75, and there has been such a transfer of an interest, or title, or beneficial interest, to the donee-agent of the power that he can exercise it in his own name, his agency will survive the death of the principal, unless such a power is expressly given only for the lifetime of the principal."

The concluding paragraphs in the Muth case read as follows: "From the foregoing authorities it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest; but, irrespective of this, the legal title to the property having passed to the trustee and from the mortgagor, the death of the latter could in no wise affect the trustee's right to carry out the trust which the mortgagor had reposed in him. It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be

maintained. 'The law may suspend its own process. As it gives the process it may regulate it. But deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.' (*Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.) The Texas cases cited by plaintiff are not in point. See in re *Horsfall's Estate*, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his successor in trust, having the legal title, could [218] execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected. (Code of Civil Procedure, Section 2603)."

The Muth and the Bell cases, *supra*, are cited in 41 C. J. 927 to sustain the rule that a power of sale in a mortgage is coupled with an interest and not affected by the death of the mortgagor. Also see 2 C. J. page 1175, Sec. 86, citing, among other cases, *Gardner v. Bank*, 25 Pac. 29, 10 Mont. 149. It was further held in the Ball case, *supra*, "* * * But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security, and irrevocable."

Counsel cites Jones on Chattel Mortgages and Conditional Sales, to the effect that the death of the mortgagor does not deprive the mortgagee of

his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute; that he is not required to file his claim in the administration proceedings, but may proceed to foreclose by notice and sale, just as he might have done had the mortgagor survived. In *Mathew v. Mathew*, 71 Pac. 344, the court held: "The death of the mortgagor did not affect the rights of the mortgagee under the contract, and the executor possessed no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime." The decisions referred to by counsel for the respective parties enable the court to determine with reasonable certainty when a power of sale survives the death of the grantor, but there appears to be nothing in the language of the decision in the Muth case, strongly relied upon by defendant, or in the other cases, even remotely hinting that a statute suspending the power of sale until the appointment of an administrator was in contemplation and held to be without force or virtue. The mortgagee's remedy by foreclosure and sale or under the power of sale or his rights under the mortgage would not have been impaired in any way by his observance of the provisions of Sec. 10, 140 R. C. M. [219]

The defendant has argued at great length his theory that the power of sale contained in the mortgage survived the death of the mortgagor, and this court is of the opinion that such power did so survive, but whether it did or did not so survive, seems

to be far from being determinative of the real issue in this case. The principal question here is whether section 10,140 R. C. M., heretofore quoted, should be applied and the double penalty enforced or whether it should be held for naught because of the claim of good faith on the part of the defendant. In citing *Jans v. Nolting*, 71 Pac. 344, defendant contends that the death of a mortgagor can not affect the rights of the mortgagee. But as it appears to the court, after the death of Simon Douglas and before the appointment of an administrator, the only control the defendant could exercise over the property of the deceased, described in the mortgage, was to possess and preserve it, awaiting the appointment of an administrator, as required by the provisions of the statute relating to the administration of estates of deceased persons, and especially the section heretofore quoted. During this period the power of alienation is suspended, and there seems to be no exception whatsoever. If the power of sale survived, as the court has held, it was suspended temporarily, until the appointment of an administrator to look after the interests of the estate. Having disposed of that feature of the case it will now be necessary to consider the defense of good faith on the part of the defendant in violating the plain provisions of section 10,140 R. C. M. A case relied upon by defendant to sustain its contention is that of *Delfelder v. Poston*, 293 Pac. 354, but an entirely different state of facts is there pre-

sented. In that case an agreement for the sale of the mortgaged property for \$140,000.00 was entered into with the mortgagor several days before his death, and the property was transferred to mortgagee according to the agreement, with the full acquiescence and approval of the widow who was thereafter appointed executrix. The property mortgaged was valued at \$93,000.00, and the amount credited on the mortgage was \$140,000.00, which was the sum agreed to by the mortgagor. Obvious reasons appear from a reading of the decision why the court declined to apply the double penalty. Many other cases have been examined with the result that the court is [220] convinced that the greater weight of authority, under like or similar circumstances, would require a strict observance of the statute in question.

It appears from the testimony that representatives of the defendant in making the sale were acting with knowledge of the provisions of law prohibiting the sale before the appointment of an administrator. At the time and place of sale there were present a lawyer, holding the office of County Attorney, and a banker from a near-by town, both of whom protested the sale as illegal before it was begun. It would seem that the representatives of defendant possessed information from a trustworthy source, and in any event were put upon enquiry, as to defendant's rights in respect to the sale of decedent's property before an administrator was appointed.

The court has considered the evidence in regard to the value of the personal property included in the mortgage and sold at public auction by representatives of the defendant, and is of the opinion that there is substantial proof to justify placing the value of the property sold, at the time of sale, at \$17,000.00, which is nearly two thousand dollars more than the price obtained at the auction sale aforesaid, which the court believes from the evidence was honestly conducted but under unfavorable conditions for such a sale. The statute in question directs that if any person alienates any of the moneys, goods, chattels, or effects of a decedent under the circumstances established in this case that he is charged therewith and liable to an action by the executor or administrator for double the value of the property so alienated, which would require the court in the instant case to award a judgment in favor of plaintiff in double the amount of the above sum, with costs, and it is so ordered.

Findings of ultimate facts and conclusions of law in accordance with the foregoing views may be submitted in compliance with the rule.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Feb. 20, 1941. C. R. Garlow,
Clerk. [221]

Thereafter, on March 5, 1941, Findings of Facts and Conclusions of Law were duly filed herein, being in the words and figures following, towit:

[222]

[Title of District Court and Cause.]

FINDING OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court, the Hon. Chas. N. Pray, Judge of said Court presiding, on the 20th day of February, 1940, and the Plaintiff appearing by his attorneys, Raymond E. Dockery and H. Leonard DeKalb, and the Defendant appearing by its attorneys, W. Q. Van Cott, D. Eugene Livingston, and J. R. Wine, and witnesses having been sworn and examined for and on behalf of the respective parties, the case having been closed, and after the submission of briefs to the Court, and after due consideration of the said cause by the Court, this Court did on the 20th day of February, 1941, render opinion in this case resolving the issues in favor of the Plaintiff and against Defendant, and in accordance therewith the Court does now find and decide:

1. That one Simon T. Douglas died on the 12th day of January, 1935; that no administrator was appointed for his estate until the 4th day of April, 1935, at which time by proper proceedings in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, E. B. Chapman, the Plaintiff herein, for and on behalf of said estate, was duly and regularly ap-

pointed as such administrator and thereafter continued at all times mentioned in the pleadings in this cause as [223] such and still is the administrator of said estate of Simon T. Douglas, deceased.

2. That the said Simon T. Douglas, during his lifetime and, to-wit, on December 27th, 1933, made, executed, and delivered to Defendant his chattel mortgage on certain sheep and other personal property securing a note payable to the Defendant herein in the sum of Seventeen Thousand (\$17,000.00) Dollars, providing for additional advances of Twenty Thousand (\$20,000.00) Dollars, which mortgage was made in conformity to the laws of the State of Montana, duly filed in the Office of the County Clerk and Recorder of Fergus County, Montana, the county in which said property was situate, the full particulars of which appear by copy thereof annexed to the pleadings herein; that under and by virtue of the terms of the said mortgage and note, the said obligation so secured fell due on the 15th day of December, 1934.

3. That prior to the death of said Simon T. Douglas, to-wit, on the 19th day of December, 1934, the said Simon T. Douglas made, executed, and delivered a renewal note and chattel mortgage in like form on the said property and the increase thereof, which said mortgage secured a note in the sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars, and providing for further advances of Twenty Thousand (\$20,000.00), which said chattel mortgage was filed of record, but did not become

effective because of the death of the said Simon T. Douglas occurring as aforesaid prior to the acceptance thereof by the Defendant.

4. That on or about the 25th day of January, 1935, after the death of said Simon T. Douglas and before the appointment of any administrator, general or special, for his said estate, the Defendant herein seized and took possession of said property so described in said mortgage of December 27th, 1933, and gave notice of sale thereof, and did, pursuant to such notice, on the 5th day of February, 1935, hold and conduct a purported chattel mortgage [224] sale and sold all of the property so seized and possessed covered by said chattel mortgage.

5. That before the holding of said sale, and at the time thereof, the Defendant's officers, agents, and employees had been, and were given, actual notice that the contemplated sale was illegal, said notice being given by responsible persons who protested the holding of said sale and who called attention of said officers, agents, and employees to the fact that the said Simon T. Douglas was dead and that no administrator had been appointed for his estate, but, nevertheless, the Defendant proceeded to, and did, at said time, sell all and singular the property described and listed in said chattel mortgage of December 27, 1933.

6. At the time of the sale of said property, there was due and owing under said note and chattel mortgage of December 27, 1933, by said Simon T.

Douglas to the Defendant herein, the sum of Sixteen Thousand Three Hundred Twenty-eight and $48/100$ (\$16,328.48) Dollars, and that the said property was sold by Defendant at said sale for the sum of Fifteen Thousand Two and $10/100$ (\$15,002.10) Dollars, which amount of money the Defendant received and kept, and that the Defendant incurred at the said sale the sum of Three Hundred Seven and $82/100$ (\$307.82) Dollars, costs and expenses of conducting said sale, and that after applying the said amount so received at said sale for said property to the said indebtedness and to the costs so incurred, there remained a balance unpaid under said note and chattel mortgage of One Thousand Six Hundred Ninety-Four and $64/100$ (\$1,694.64) Dollars, and that claim therefor has since been duly filed by the Defendant herein with the said Plaintiff as administrator of the estate of Simon T. Douglas, deceased. That at the time of the said sale, to-wit, on the 5th day of February, 1935, weather conditions were inclement and such as to make the said time and date unfavorable for the sale and disposition of sheep and other property of character described in said chattel mortgage. [225]

7. That at the time of the said sale, on the 5th day of February, 1935, the said property so seized and sold by Defendant, being all of the property described in said chattel mortgage, was of the reasonable value of Seventeen Thousand (\$17,000.00) Dollars.

As conclusions of law from the foregoing facts, the Court decides that at the time of the execution of said chattel mortgage, to-wit, on the 27th day of December, 1933, and at the time of the seizure and sale of said property so covered by said chattel mortgage, there existed, and still exists, a statute in the State of Montana, the same being Section 10140 of the Revised Codes of the State of Montana, readings as follows:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

That the said statute suspended the right of exercise of the said power of sale contained in said mortgage, and at the time of the sale of said property, on the 5th day of February, 1935, the Defendant was proceeding without right and contrary to the law and subject to the penalty prescribed in said Section 10140, and under the said section, the Plaintiff is entitled to have and recover of and from the Defendant double the value of said property, to-wit, the sum of Thirty-four Thousand (\$34,000.00) Dollars, and that from the said judgment, the Defendant is entitled to a credit of the amount so received at said sale, to-wit, the sum of Fifteen Thousand

Two and 10/100 (\$15,002.10) Dollars, which includes the costs incurred in making said sale in the sum of Three Hundred Seven and 82/100 (\$307.82) Dollars, and the deficiency or balance remaining unpaid and unsatisfied of One Thousand Six Hundred Ninety-four and 64/100 (\$1,694.64) Dollars with interest on said balance at the rate of six and one-half per cent ($6\frac{1}{2}\%$) from the date of said sale to the date hereof, said deficiency and interest amounting at this date to the sum of Two Thousand Three Hundred Sixty-four [226] and 23/100 (\$2,364.23) Dollars, making a total credit to which Defendant is entitled of Seventeen Thousand Three Hundred Sixty-six and 83/100 Dollars (\$17,366.83).

That Plaintiff is entitled to a judgment of this Court, after deducting said sums as credit for the sum of Sixteen Thousand Six Hundred Thirty-three and 17/100 (\$16,633.17) Dollars over and above all of said credits, and the Plaintiff is entitled to a judgment for the said remaining sum aforesaid with interest from the date hereof at the rate of six per cent (6%) per annum thereon until paid, and that Plaintiff is entitled to its costs and disbursements herein expended and incurred. Let judgment be entered accordingly.

Done in open Court this 5th day of March, 1941.

CHARLES N. PRAY

District Judge

[Endorsed]: Filed Mar. 5, 1941. [227]

Thereafter, on March 5, 1941, a Judgment was duly filed and Entered herein, and is in the words and figures following, towit: [228]

In the District Court of the United States
in and for the District of Montana.

No. 1237.

E. B. Chapman, as Administrator of the Estate of
Simon T. Douglas, deceased,

Plaintiff,

vs.

Regional Agricultural Credit Corporation of Spo-
kane, Washington, A Corporation,

Defendant.

JUDGMENT.

This cause came on regularly for hearing before the Hon. Chas. N. Pray, Judge presiding, sitting without a jury, on February 20, 1940, the Plaintiff appearing by his attorneys, Raymond E. Dockery and H. Leonard De Kalb, and the Defendant appearing by its attorneys W. Q. Van Cott, D. Eugene Livingston, and J. R. Wine, and witnesses having been sworn and examined, and the case having been closed, and the cause submitted to the Court for decision, and the Court having on the 20th day of February, 1941, by its opinion, resolved the issue in favor of plaintiff and against defendant, and the Court having made and entered herein Finding of Facts and Conclusions of Law, wherein and

whereby it was decided the Plaintiff do have judgment against the Defendant for the sum of herein set forth and costs.

It Is Accordingly Hereby Ordered, Adjudged, and Decreed that the plaintiff do have and recover of and from the defendant the sum of Sixteen Thousand Six Hundred Thirty-three and 17/100 (\$16,633.17) Dollars together with interest thereon from the date hereof at the rate of Six per cent (6%) per annum until paid, and for Plaintiff's costs and disbursements herein in the sum of \$116.90.

Done in open Court this 5th day of March, 1941.

CHARLES N. PRAY

District Judge.

[Endorsed]: Filed and Ent. March 5, 1941. C. R. Garlow, Clerk. By Max Jenks, Deputy. [229]

Thereafter, on March 12, 1941, a Motion for New Trial was duly filed herein, being in the words and figures following, towit: [230]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant above named and in the event that its motion to vacate the judgment heretofore entered on March 5, 1941 and to enter judgment for defendant is denied, moves this Honorable Court for an order granting a new trial for the reason that the judgment heretofore entered is against law, for the various reasons advanced

by defendant in the trial of the case and in briefs submitted to the court, and for the further reason that the judgment heretofore entered is the imposition of a penalty against a corporation created and wholly owned by and an instrumentality of the United States contrary to law.

This motion is made upon the minutes of this court and upon the evidence, proceedings, pleadings and record in said cause.

W. Q. VAN COTT

D. E. LIVINGSTON

Attorneys for Defendant

State of Utah

County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard DeKalb and Raymond E. Dockery, [231] the attorneys for the plaintiff above named; that on March 11, 1941 prior to 4:00 o'clock P. M. affiant deposited in said United States mail enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery, at their post office address, to wit, Lewistown, Montana, a full, true and correct copy of the foregoing motion for new trial.

W. Q. VAN COTT

Subscribed and sworn to before me this 11th day of March, 1941.

[Seal] ANNE OHLIN

Notary Public residing at Salt Lake City, Utah

My commission expires June 18, 1941.

[Endorsed]: Filed March 12, 1941. C. R. Garlow, Clerk. [232]

Thereafter, on March 12, 1941, a Motion to Vacate Judgment For Plaintiff and to Enter Judgment for Defendant was duly filed herein, being in the words and figures following, towit: [233]

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT FOR
PLAINTIFF AND TO ENTER JUDGMENT
FOR DEFENDANT

Comes now the defendant in above entitled cause and hereby moves the above entitled court to enter an order herein vacating the Judgment entered in said cause in favor of plaintiff and against defendant on March 5, 1941, and to make and enter a judgment in said cause dismissing plaintiff's complaint on file herein upon the merits and awarding defendant its costs herein necessarily expended. This motion is based upon the following grounds:

1. It is established without contradiction in this case that defendant was created and wholly owned by the United States of America as an instrumen-

tality thereof. The Judgment entered herein on March 5, 1941, as aforesaid is for a penalty under the provisions of Section 10140, Revised Codes of Montana, 1935, as fully appears from the Findings of Fact and Conclusions of Law herein pursuant to which said Judgment was made and entered. By reason of the fact that defendant was an instrumentality of said United States of America wholly owned thereby, defendant, as matter of law, has never been liable for a penalty and no cause of action for such penalty has ever vested or could vest in plaintiff and said judgment for such penalty is unlawful.

2. The said Montana statute is inapplicable to the case presented to the court for the reasons asserted by defendant at the trial and in its briefs.

This motion is made upon the minutes of the above entitled [234] court and upon the evidence, proceedings, pleadings and record in said cause.

W. Q. VAN COTT

D. E. LIVINGSTON

Attorneys for Defendant

State of Utah,
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard

DeKalb and Raymond E. Dockery, the attorneys for the plaintiff above named; that on March 11, 1941, prior to 4 o'clock P. M., affiant deposited in said United States mail, enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery, at their post office address, to wit, Lewistown, Montana, a full, true and correct copy of the above motion to vacate judgment for plaintiff and to enter judgment for defendant.

W. Q. VAN COTT

Subscribed and sworn to before me this 11th day of March, 1941.

My commission expires June 18, 1941.

[Seal]

ANNE OHLIN,

Notary Public, residing at Salt Lake City, Utah.

[Endorsed]: Filed March 12, 1941. C. R. Garlow,
Clerk. [235]

Thereafter, on March 12, 1941, Objections To and Motions To Amend Findings of Fact and Conclusions of Law, were duly filed herein, being in the words and figures following, to wit: [236]

[Title of District Court and Cause.]

OBJECTIONS TO AND MOTIONS TO AMEND
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant and objects to and moves the court to amend the Findings of Fact and make additional Findings of Fact as follows:

1. Moves the court to amend its Findings of Fact by finding that prior to the death of Simon T. Douglas and at the time of the seizure and sale of the property mortgaged by him to defendant the indebtedness owing by him to defendant was in default.

2. Moves the court to amend its Findings of Fact by finding that, following the death of Simon T. Douglas on January 12, 1935, and before the seizure of the mortgaged property and sale thereof by defendant, defendant notified the sole heir of Simon T. Douglas that she must arrange to assume responsibility for the mortgaged property and indebtedness, or foreclosure sale would be necessary and that said sole heir notified defendant that she was not going to assume such responsibility. [237]

3. Moves the court to amend its Findings of Fact by finding that, following the warning given by defendant to the sole heir of Simon T. Douglas that arrangements must be made to assume responsibility for the mortgaged property and the declination of said sole heir so to do, defendant was under the necessity of advancing funds for the care and preservation of the mortgaged property.

4. Objects to that part of the Finding contained in paragraph 5 that any of defendant's officers, agents and employes had been given notice prior to the commencement of the sale, that said sale was claimed to be illegal.

5. Moves the court to amend its Findings of Fact by finding that defendant, in seizing and sell-

ing the property mortgaged to it by the decedent, Simon T. Douglas, did so openly and with notice to all persons concerned and that the acts of the defendant in that regard were without secrecy or concealment.

6. Moves the court to amend its Findings of Fact by finding that the defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent, Simon T. Douglas, or attempting to divert the assets of his estate from those entitled thereto.

7. Objects to the finding of the court in paragraph 6 that at the time of the sale on February 5, 1935, weather conditions were unfavorable for the sale and disposition of sheep and other property included in the chattel mortgage.

8. Moves the court to amend its Findings of Fact by finding that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available. [238]

9. Moves the court to amend its Findings of Fact by finding that defendant gave notice of the proposed sale of the mortgaged chattels as required by law; that during said period of notice no persons made any claim that said sale was invalid or illegal; and that the only claim of invalidity or illegality was made at the time and place when and where said sale was being held pursuant to said notice.

10. Moves the court to amend its Findings of Fact by finding that the only statements made to the effect that the proposed sale of the mortgaged property was invalid or illegal were made by persons not shown to be connected with the estate of Simon T. Douglas or the heir or creditors of Simon T. Douglas.

11. Moves the court to amend its Findings of Fact by finding that the sale of the mortgaged property was well attended by numerous responsible bidders, able and willing to bid at the sale of the mortgaged property, and that they did so bid competitively.

12. Objects to the finding of the court in paragraph 7 that the property seized and sold by the defendant, being all of the property described in said chattel mortgage, was of the reasonable value of \$17,000.00.

13. Moves the court to amend its Findings of Fact by finding that the reasonable market value of the mortgaged property sold by defendant on February 5, 1935, was not in excess of \$15,002.10.

14. Moves the court to amend its Findings of Fact by finding that at the time of the seizure and sale of the mortgaged property the mortgage from Simon T. Douglas to defendant dated December 27, 1933 was in full force and effect; that the debt secured thereby was in default; and that said mortgage contained a power to sell the mortgaged property. [239]

15. Moves the court to amend its Findings of

Fact by finding that defendant is a corporation created by the United States; that all of the stock thereof was and is owned by the United States, and that it is an instrumentality of the United States.

Comes now the defendant and objects to and moves the court to amend its Conclusions of Law and make additional Conclusions of Law as follows:

1. Objects to the Conclusion of Law of the court that Section 10140 of the Revised Codes of Montana, 1935, suspended the right of exercise of the power of sale contained in the chattel mortgage from the decedent, Simon T. Douglas, to defendant.

2. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is not applicable to a sale made under a power of sale in a mortgage such as that involved in this case.

3. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is inapplicable to a mortgagee acting in good faith under a power of sale.

4. Moves the court to amend its Conclusions of Law by concluding that defendant in selling the mortgaged property was acting in good faith.

5. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana, 1935, does not apply unless there is an alienation made with intent wrongfully or fraudulently to deprive the estate, heirs or creditors of assets of the decedent's estate. [240]

6. Objects to the Conclusion of Law that defendant, in making the sale of mortgaged property on February 5, 1935, was proceeding without right and contrary to law and subject to the penalty prescribed in Section 10140, Revised Codes of Montana, 1935.

7. Objects to the Conclusion of Law that pursuant to Section 10140, Revised Codes of Montana 1935, plaintiff is entitled to recover from defendant double the value of the property sold for the reason that the same is the imposition of a penalty against an instrumentality of the United States Government.

8. Objects to the Conclusion of Law that plaintiff is entitled to a judgment of the court for the sum of \$16,633.17 for the reason that such judgment constitutes the imposition of a penalty against an instrumentality of the United States.

9. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, provides for a penalty which cannot be imposed on the defendant because it is a corporation created and wholly owned by, and an instrumentality of, the United States.

Respectfully submitted,

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Defendant. [241]

State of Utah,
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard DeKalb and Raymond E. Dockery, the attorneys for the plaintiff above named; that on March 11, 1941, prior to 4 o'clock P. M., affiant deposited in said United States mail, enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery at their post office address, to wit: Lewistown, Montana, a full, true and correct copy of the hereto attached Objections to and Motions to Amend Findings of Fact and Conclusions of Law.

W. Q. VAN COTT

Subscribed and sworn to before me this 11th day of March, 1941.

[Seal]

ANNE OHLIN,

Notary Public, Residing at Salt Lake City, Utah.

My commission expires June 18, 1941.

[Endorsed]: Filed March 12, 1941. C. R. Garlow, Clerk. [242]

Thereafter, on March 17, 1941, Plaintiff's Brief on Defendant's Objections To and Motion To Amend Findings of Facts and Conclusions of Law, was duly filed herein, being in the words and figures following, to wit: [243]

[Title of District Court and Cause.]

PLAINTIFF'S BRIEF ON DEFENDANT'S OB-
JECTIONS TO AND MOTION TO AMEND
FINDING OF FACTS AND CONCLUSIONS
OF LAW.

We shall give consideration to the fourteen specifications set forth in defendant's motion in the order enumerated.

1. Finding No. 2 of the Court shows that the chattel mortgage foreclosed fell due on the 15th day of December, 1934. We submit there is no purpose to be subserved in disturbing the finding with any amendment. The amendment suggested is a conclusion of law from the fact set forth in Finding No. 2.

2. The suggested Finding No. 2 has no basis in the evidence. Besides, it is wholly unnecessary, if it were true. The testimony in the record discloses that a conference was had with Mr. and Mrs. Worthington. A telegram was sent, indicating that it was necessary to assume all indebtedness, not alone that of the Regional, but all other. It is not essential to the rights of either party that this be detailed in the findings. There is no evidence to support the fact sought to be injected by amendment.

“That said sole heir notified defendant, that she was not going to assume such responsibility.”

3. It is neither necessary nor is there any ground for amending the findings to include what is sought to be included in the findings under paragraph No. 3 of the suggested amendments. There is no issue or controversy over what the evidence shows in connection therewith, nor is there any point which will be preserved by the granting of the third request. [244]

4. The finding of the Court No. 5 is based upon uncontroverted evidence and is an essential part of the Court's findings. In one view of the case, it is an indispensable finding.

5. The findings have been drawn, we believe, with scientific accuracy and correctly set forth the facts from which all legitimate inferences may be drawn. Under the authorities, it is wholly immaterial how openly the sale proceedings were conducted. No issue was made upon that matter, and the findings, this one included, resolve all of the issues. The defendant has not the right to ask for any such finding because it is wholly immaterial under the facts adduced at the trial.

6. The sixth suggested amendment is wholly immaterial, is contrary to the theory upon which the decision, the finding of facts, conclusions of law and decree have been entered. Under the decisions, good faith is not a defense. Under the statute, which is the basis for the decision, good faith is not a defense, and if it were a defense, good faith is out of

the controversy, inasmuch as the essential element of good faith is a want of knowledge, and the uncontroverted evidence shows notice and knowledge of the illegality of the proceedings to foreclose. It is not material with what motive defendant proceeded.

7. In the opinion of the Court and in harmony with all of the evidence, paragraph No. 6 correctly sets forth the weather condition. Clearly, the seventh objection of defendant should be lightly regarded.

8. By the eighth suggested amendment defendant persists in an attempt to inject into the findings a construction of the law upon which defendant has had its day in Court. It is wholly immaterial what efforts were put forth to make the sale if the act was tortuous. As we have heretofore pointed out, good faith is out of the case, both by virtue of the law and by virtue of the facts which the Court has found.

9. In the findings, every essential thing suggested by proposed amendment No. 9 is in the findings. It is immaterial at what state of the proceedings prior to the disposition of the property notice of illegality was given, nor was notice of any kind necessary under the Montana statute upon which the action is based. The rule of accountability does not permit a plea of ignorance of the law. [245]

10. The suggested finding No. 10 injects a new note into the law, inasmuch as it seems to be assumed that notice and knowledge of illegality must be derived from persons in interest. The theory

upon which the findings were made does not take into account the necessity of any notice.

11. Where there is no issue in the case concerning the number or character of bidders at the sale, the finding is wholly immaterial.

12. The twelfth offered objection is based upon conflicting evidence which the Court has resolved and cannot be reopened except by a new trial.

13. The thirteenth offer of amendment and objection is like unto the twelfth, based upon conflicting evidence.

14. The reference to the mortgage in Finding No. 12 fully covers every feature of the fourteenth ground of motion. The mortgage is in evidence. None of its terms are in dispute. It speaks for itself. Such power of sale as it contains is before this or any Court that will review it.

15. The fifteenth finding is wholly immaterial. No controversy exists with regard thereto. The fact was conceded at the trial and stands out as a fundamental, undisputed issue.

As to the nine suggested amendments of the conclusions of law, it may be said simply and once and for all that their adoption would bring about a contrary result. The law has been fully argued; the facts fully considered, and there is no further consideration of such points possible except a new trial be granted.

In support of the general principles reflected in the resistance of defendant's motion to amend findings, etc., we cite the following authorities:

In the first place, under the new rules, it is not necessary to reserve any rights that any request for findings be made.

Rule 52, Subdivision (a)

In

8 Enc. of Proc. 1024,

It is said:

“If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with.” [246]

The rule with regard to findings is entirely satisfied by determining the issues of fact as they were made at the trial as distinguished from the pleadings. Thus, the rule is stated in

8 Enc. of Proc. 1042,

which reads as follows:

“The general rule is satisfied, if all the facts essential to a recovery, and which are controverted by the evidence upon the trial, are especially found, that is, findings may be sufficient though they do not find all the facts, which, though put in issue in the pleadings, are yet not controverted on the trial, by the evidence, or on the other hand, are established by the undisputed evidence, admitted by the pleadings, or by stipulation of the parties.”

Findings are not necessary on immaterial issues of fact.

“Nothing more is required than that the material issues should be covered by the findings;

a failure to make findings of fact upon immaterial issues is not error."

8 Enc. of Proc. 1045.

Again, it is said:

"When the Court finds on an issue that ultimately determines and necessarily supports the judgment rendered, or when it finds facts which require the judgment rendered, other issues in the case become immaterial, and a failure to find thereon, or error in such other findings, becomes immaterial and is not ground for reversal on appeal."

8 Enc. of Proc. 1045, 1046, 1047.

The recital of evidence is not required or proper.

"Findings of fact should be statements of the ultimate or controlling facts which are proved and not merely of the evidence or subordinate facts upon which they are based."

8 Enc. of Proc. 1048;

Wilson v. Merchants Loan, 183 U. S. 121, 46

L. Ed. 113;

Davenport v. Paris, 136 U. S. 580, 34 L. Ed.

548.

In fact, what defendant requires is violative of the rule with regard to proper findings. In

8 Enc. of Proc. 1053, 1054,

it is said:

"As the findings should contain only the ultimate facts, the mere setting out of all the evidence in the cause, conflicting and undisputed,

as appears in a bill of exception, and rendering [247] judgment thereon, does not constitute a finding of the ultimate issues of fact as required by the statutes, and cannot be made the basis of a judgment. Such a finding will be set aside if made, and it is proper for the court to refuse to make findings which are mere recitals of evidence and not of the ultimate facts.

So too, the court is not bound to include in its findings evidentiary facts leading to or bearing upon the ultimate facts; and such matters in a finding of fact must be disregarded, except to the extent that they tend to explain or give color to the findings of ultimate facts.”

Throughout the proposed amendments and in suggested findings, counsel have urged upon the court, findings that were designed to show good faith. Where this statute has been under consideration, it is wholly immaterial.

In

Sails v. Whitman (Okla) 42 Pac. 2d 275

it is said:

“Wrongful depends not so much on the state of mind as upon the acts done.”

Again it is said:

“Statute requires no wrongful intention and none is required other than intention to do the thing which the law forbids.”

In

Litz v. Exchange Bank, 15 Okla. 864, 83 Pac.
790

where good faith was acknowledged, the court said that such an act constituted of and "was a wrongful intermeddling with the property."

See also

Jahns v. Nolting 29 Cal. 508

Respectfully submitted,

H. LEONARD DeKALB

RAYMOND E. DOCKERY,

Attorneys for Plaintiff.

[Endorsed]: Filed March 17, 1941. C. R. Garlow,
Clerk. By C. G. Kegel, Deputy. [248]

Thereafter, on July 17, 1941, an Order denying defendant's Motion for New Trial, Motion to Vacate Judgment, Motion to Enter Judgment in favor of defendant, and Motion to Amend Findings of Fact and Conclusions of Law, was duly filed and entered herein, being in the words and figures following, to-wit: [249]

[Title of District Court and Cause]:

The Court has considered all of the four motions and seven briefs submitted in the above entitled cause since the entry of judgment for the plaintiff, and after such consideration is convinced that the findings and conclusions adopted by the Court subsequent to decision of the case in favor of plain-

tiff are sufficient; for that reason, the Court being duly advised, and good cause appearing therefor, the proposed amendments of defendant are hereby overruled and denied.

In the opinion of the Court the other three pending motions of the defendant should likewise be overruled and denied, and it is so ordered.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered July 17, 1941. C. R. Garlow, Clerk. By Max Jenks, Deputy. [250]

Thereafter, on September 17, 1941, a Notice of Appeal was duly filed herein, being in the words and figures following, to-wit: [251]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Regional Agricultural Credit Corporation of Spokane, Washington, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of plaintiff and against defendant entered in this action on March 5, 1941.

W. Q. VAN COTT,
D. EUGENE LIVINGSTON,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Sept. 17, 1941. C. R. Garlow, Clerk. [252]

Thereafter, on September 17, 1941, a Stipulation and Order regarding Bond on Appeal, and Staying Execution pending appeal, was duly filed and entered herein, being in the words and figures following, to-wit: [253]

[Title of District Court and Cause.]

STIPULATION REGARDING BOND FOR
COSTS ON APPEAL AND FOR SUPERSE-
DEAS BOND AND CONSENTING TO
STAY OF EXECUTION PENDING AP-
PEAL.

Pursuant to Rule 62 paragraph (2) of Rules of Procedure for the District Courts of the United States, the parties above named hereby stipulate that the defendant is not required to file bond for costs on appeal or supersedeas bond as described in Rule 73 paragraphs (c) and (d) of said Rules of Procedure and that the court may make an order staying execution pending appeal herein.

Dated July 25th, 1941.

W. Q. VAN COTT

D. E. LIVINGSTON,

Attorneys for Plaintiff

H. LEONARD DE KALB,

RAYMOND E. DOCKERY,

Attorneys for Defendant.

Pursuant to the foregoing stipulation it is hereby ordered that execution herein is stayed pending appeal.

CHARLES N. PRAY,
Judge.

Dated Sept. 17th, 1941.

[Endorsed]: Filed and entered, Sept. 17, 1941.
C. R. Garlow, Clerk. [254]

Thereafter, on September 22, 1941, a Designation of Portions of Record on Appeal, was duly filed herein, being in the words and figures following, to-wit: [255]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON AP-
PEAL.

Appellant hereby designates the following portions of the record, proceedings and evidence in the above entitled case to be contained in the record on appeal:

1. Original complaint (part of transcript of record on removal from State court filed in the United States District Court July 10, 1935). Exhibit A may be omitted because it is a copy of item No. 22 hereof. Exhibit B may be omitted because it is im-

material. Exhibits C and D may be omitted because they are copies of item No. 20 hereof.

2. Summons and attached Sheriff's Return of Service (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

3. Notice of Presentation of Petition and Bond for Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

4. Affidavit of Service of Petition for Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

5. Petition for Removal (part of transcript of record on removal from State Court filed in the United States District [256] Court July 10, 1935).

6. Bond on Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

7. Affidavit of Service by Mail (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

8. Order of Removal by State Judge McConohie (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

9. Certificate by Clerk of State Court certifying Transcript on Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

10. Amended Demurrer filed August 8, 1935 (including order dated November 18, 1935 on the blue cover thereof signed by District Judge Charles N. Pray reading, "The within demurrer came on regularly for hearing under Rule 40 (2) of the Rules of this court and having been duly considered and the court being advised and good cause appearing therefor the said demurrer is hereby sustained as to both paragraphs thereof with leave to amend within ten days from receipt of notice hereof.").

11. All briefs filed by the parties in regard to the amended demurrer to the original complaint understood by defendant and appellant to be as follows:

Two page brief commencing with the words, "The complaint in this case is predicated upon the provisions of Section 10140 Revised Codes of Montana for the year 1921 reading as follows:" and signed Raymond E. Dockery and Belden & DeKalb, Attorneys for Plaintiff, and probably filed on or about September 27, 1935.

Defendant's brief on Demurrer consisting of 13 pages signed J. R. Wine, attorney for defendant, and probably filed [257] on or about October 5, 1935.

Plaintiff's reply Brief on Demurrer consisting of 7 pages signed Belden & DeKalb and Raymond E. Dockery, Attorneys for Plaintiff, and probably filed October 17, 1935.

Defendant's Reply Brief consisting of 4 pages, signed J. R. Wine, Attorney for Defendant, probably filed October 28, 1935.

12. Amended Complaint filed November 29, 1935.
13. Demurrer to Amended Complaint filed December 3, 1935.
14. Entered Order overruling demurrer to amended complaint dated May 12, 1936.
15. Answer and Cross Complaint filed January 25, 1936. Exhibit A, copy of the chattel mortgage dated December 27, 1933, may be omitted because it is a copy of item No. 22 hereof. Exhibit B may be omitted because it is a copy of item No. 20 hereof. Exhibit C may be omitted because it is immaterial.
16. Reply filed July 29, 1936.
17. Motion to Strike from Reply filed August 18, 1936.
18. Amended Reply filed November 6, 1937. Exhibit A, chattel mortgage dated December 19, 1934, may be omitted because it is immaterial.
19. Stipulation filed January 11, 1940.
20. Exhibit No. 1 introduced in evidence February 20, 1940.
21. Exhibit No. 2, Promissory Note, introduced in evidence February 20, 1940.
22. Exhibit No. 3, Chattel Mortgage, introduced in evidence February 20, 1940.
23. Exhibit No. 4, copy of telegram introduced in evidence February 20, 1940.
24. Exhibit No. 5, telegram introduced in evidence February 20, 1940.
25. Exhibit No. 6, copies of letters introduced in [258] evidence February 20, 1940.

26. Exhibit No. 7, consisting of four pages, introduced in evidence February 20, 1940.

27. Exhibit No. 8, Power of Attorney, introduced in evidence February 20, 1940.

28. Exhibit No. 9, Application for Renewal, introduced in evidence February 20, 1940.

29. Transcript of evidence and proceedings at trial, two copies of which are transmitted herewith.

30. Memorandum of Decision filed February 20, 1941.

31. Findings of Fact and Conclusions of Law filed March 5, 1941.

32. Judgment filed, entered and docketed March 5, 1941.

33. Motion for New Trial filed March 12, 1941.

34. Motion to Vacate Judgment and to enter Judgment for Defendant filed March 12, 1941.

35. Objections to and Motions to amend Findings of Fact and Conclusions of Law filed March 12, 1941.

36. Plaintiff's brief on Defendant's Objections to and Motion to Amend Findings of Fact and Conclusions of Law filed March 17, 1941.

37. Order Denying Motion for New Trial, Motion to Vacate Judgment and to Enter Judgment for Defendant and Objections to and Motion to Amend Findings of Fact and Conclusions of Law filed July 16, 1941.

38. Notice of Appeal.

39. Stipulation regarding Bond for Costs on

Appeal and for Supersedeas Bond and Consenting to Stay of Execution Pending Appeal.

40. Order Staying Execution pending Appeal.

41. Designation of Portions of Record, Proceedings and Evidence to be contained in the record on appeal. [259]

42. Statement of Points pursuant to Rule 75, paragraph (d).

W. Q. VAN COTT

D. EUGENE LIVINGSTON

Attorneys for Appellant

State of Utah,
County of Salt Lake—ss.

D. Eugene Livingston, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named defendant with offices in Salt Lake City, Utah; that the offices for Plaintiff's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah and Lewistown, Montana; that affiant on September 19, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Designation of Portions of

Record, Proceedings and evidence to be Contained in the Record on Appeal.

D. EUGENE LIVINGSTON

Subscribed and sworn to before me this 19th day of September, 1941.

[Seal] ANNE OHLIN

Notary Public. Residing at Salt Lake City, Utah.

My commission expires June 18, 1945.

[Endorsed]: Filed Sept. 22, 1941. C. R. Garlow, Clerk. [260]

Thereafter, on September 22, 1941, Statement of Points on Which Appellant Intends to Rely on Appeal, was duly filed herein, being in the words and figures following, to-wit: [261]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Inasmuch as appellant is not designating for inclusion the entire record and all proceedings and evidence in the action, it hereby makes the following statement of the points on which it intends to rely on the appeal:

1. Section 10140, Revised Codes Montana 1935, is inapplicable to a sale made pursuant to a power of sale. Such a power is coupled with an interest, survives the death of the mortgagor and is not sus-

pended by the Montana statute. A state statute is incompetent to suspend a right of the United States or its instrumentalities.

2. The Montana penalty statute, Section 10140 Revised Codes Montana 1935, is a highly penal statute, and should not have been applied to the case at bar because there was no evidence that the sale of the mortgaged assets was fraudulent or pursuant to any wrongful motive or for the purpose of wrongfully depriving decedent's estate of its assets.

3. There is no substantial evidence to sustain the court's finding that the reasonable value of the property sold was \$17,000.00. The evidence conclusively and without contradiction showed that the property sold for its full value, \$15,002.10.

4. It is undisputed that plaintiff had a first lien on the property sold and was entitled to the proceeds thereof up to the extent of the debt owing. If the property sold for its full value plaintiff was not damaged because not enough was realized to pay defendant's debt. If it sold for less than its full value the damage is only the difference between the sale price and the full value and the penalty should be applied if at all only to such difference. [262]

5. Defendant is a wholly owned instrumentality of the United States Government and is not subject to the penalty provisions of the Montana Statute.

W. Q. VAN COTT

D. EUGENE LIVINGSTON

Attorneys for Appellant.

State of Utah,
County of Salt Lake—ss.

D. Eugene Livingston, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named defendant with offices in Salt Lake City, Utah; that the offices for plaintiff's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah, and Lewistown, Montana; that affiant on September 19, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Statement of Points on which Appellant intends to rely on Appeal.

D. EUGENE LIVINGSTON,

Subscribed and sworn to before me this 19 day of September, 1941.

[Seal]

ANNE OHLIN

Notary Public, Residing at Salt Lake City, Utah.

My commission expires June 18, 1945.

[Endorsed]: Sept. 22, 1941. C. R. Garlow, Clerk.

[263]

Thereafter, on October 1, 1941, Objection to Designation of Portions of Record on Appeal, was duly filed herein by the plaintiff, and is in the words and figures following, to-wit: [264]

[Title of District Court and Cause.]

OBJECTION TO DEFENDANT AND APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL.

The plaintiff now objects to the inclusion in the record on appeal of all of the following enumerated matters appearing in defendant and appellant's designation of portions of the record, etc., to be contained in the record on appeal, to-wit:

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and designation 36 all on the ground that the same were superseded and became of no force or virtue upon the filing of amended pleadings, which latter are properly designated as proper portions of the record.

Plaintiff further objects to the omission from the amended reply of Exhibit "A" annexed thereto, as requested in defendant and appellant's designation No. 18.

This objection is made severally to the above enumerated designations of defendant and appellant on the ground that the same are wholly immaterial, wholly superseded, and result in confusion and in the encumbering of the record; and plaintiff specifies that briefs filed in the lower courts cannot be considered as a part of the record or appeal.

Respectfully submitted.

RAYMOND E. DOCKERY

H. LEONARD DE KALB

Attorneys for Plaintiff. [265]

State of Montana,
County of Fergus—ss.

Raymond E. Dockery being first duly sworn deposes and says:

That he is one of the attorneys for the above named plaintiff, with offices in Lewistown, Montana; that the offices for defendants of attorneys W. Q. Van Cott and D. Eugene Livingston, are in Continental Bank Building, Salt Lake City, Utah; that there is regular communication of mail between Lewistown, Montana and Salt Lake City, Utah; that affiant, on September 30, 1941, prior to five o'clock P. M., deposited in the United States mail, postage prepaid, addressed to W. Q. Van Cott and D. Eugene Livingston, a full, true and correct copy of the foregoing Objection to Designations of Portions of Record, etc., to be contained in the record on appeal. RAYMOND E. DOCKERY

Subscribed and sworn to before me this 30th day of September, 1941. HAZEL K. HOPKINS

[Seal]

[266]

Notary Public for the State of Montana, Residing
at Lewistown, Montana.

My Commission expires October 26, 1943.

[Endorsed]: Filed Oct. 1, 1941. C. R. Garlow,
Clerk.

Thereafter, on October 1, 1941, Designation of Additional Portion of Record on Appeal was duly filed herein, being in the words and figures following, to-wit: [267]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTION
OF RECORD TO BE INCLUDED IN TRAN-
SCRIPT ON APPEAL.

Comes Now, the above named plaintiff and requests that the amended reply filed November 6th, 1937, together with Exhibit "A" and the chattel mortgage dated December 19, 1934, annexed thereto, shall be included in the record on appeal herein.

If the appellant includes in the record on appeal herein, his designations Nos. 1 to 11, and 18 and 36, then plaintiff designates his objections filed herein as a part of the record to be included in said appeal.

Respectfully submitted.

RAYMOND E. DOCKERY,

H. LEONARD DeKALB,

Attorneys for Plaintiff. [268]

Thereafter, on October 14, 1941, an Order for Transmission of Original Exhibits was duly filed and entered herein, being in the words and figures following, to wit: [270]

[Title of District Court and Cause.]

ORDER

It being the opinion of the court that Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9, introduced in evidence at the trial of the above case, should be sent to the

Circuit Court of Appeals in lieu of copies, It Is Hereby Ordered that the same be forwarded by the Clerk of the Court to the Clerk of the Ninth Circuit Court of Appeals by registered mail.

CHARLES N. PRAY,
Judge.

Dated October 14th, 1941.

[Endorsed]: Filed and entered October 14, 1941.
C. R. Garlow, Clerk. [271]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 272 pages, numbered consecutively from 1 to 272, constitute a full, true and correct transcript of all portions of the record in case Number 1237, E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, Plaintiff, vs. Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, defendant, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9, which were offered by the defendant and received in evidence at the trial of said cause.

I further certify that the costs of said Transcript amount to the sum of Fifty-four and 50/100ths Dollars (\$54.50) and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 14th day of October, A. D. 1941.

[Seal]

C. R. GARLOW,

Clerk U. S. Supreme Court,
District of Montana,

By C. G. KEGEL,

Deputy Clerk. [272]

[Endorsed]: No. 9956. United States Circuit Court of Appeals for the Ninth Circuit. Regional Agricultural Credit Corporation of Spokane, Washington, Appellant, vs. E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, Deceased, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Montana.

Filed October 23, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

Case No. 9956

REGIONAL AGRICULTURAL CREDIT COR-
PORATION OF SPOKANE, WASHING-
TON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate
of Simon T. Douglas, deceased,

Respondent.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant hereby makes the following statement
of the points on which it intends to rely on this
appeal:

1. Section 10140, Revised Codes Montana 1935,
is inapplicable to a sale made pursuant to a power
of sale. Such a power is coupled with an interest,
survives the death of the mortgagor and is not sus-
pended by the Montana statute. A state statute is
incompetent to suspend a right of the United States
or its instrumentalities.

2. The Montana penalty statute, Section 10140
Revised Codes Montana 1935, is a highly penal
statute, and should not have been applied to the case
at bar because there was no evidence that the sale
of the mortgaged assets was fraudulent or pursuant

to any wrongful motive or for the purpose of wrongfully depriving decedent's estate of its assets.

3. There is no substantial evidence to sustain the court's finding that the reasonable value of the property sold was \$17,000.00. The evidence conclusively and without contradiction showed that the property sold for its full value, \$15,002.10.

4. It is undisputed that plaintiff had a first lien on the property sold and was entitled to the proceeds thereof up to the extent of the debt owing. If the property sold for its full value plaintiff was not damaged because not enough was realized to pay defendant's debt. If it sold for less than its full value the damage is only the difference between the sale price and the full value and the penalty should be applied if at all only to such difference.

5. Defendant is a wholly owned instrumentality of the United States Government and is not subject to the penalty provisions of the Montana statute.

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Appellants.

[272-A]

State of Utah,

County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named appellant with offices in Salt Lake City, Utah; that the offices for respondent's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail be-

tween Salt Lake City, Utah, and Lewistown, Montana; that affiant on October 30, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Statement of Points on which Appellant Intends to Rely.

W. Q. VAN COTT

Subscribed and sworn to before me this 30th day of October, 1941.

[Seal]

SID. M. CORNWALL,
Notary Public Residing at Salt Lake City, Utah.
My commission expires July 21, 1942.

[Endorsed]: Filed Oct. 31, 1941. [272]

[Title of Circuit Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
AS NECESSARY FOR CONSIDERATION
OF THIS APPEAL

Appellant hereby designates as necessary for the consideration of this appeal the entire record certified by the Clerk of the District Court and the 9 original exhibits transmitted therewith, with the exception that the last document in the group of documents marked "Exhibit 1" is not necessary because it is a copy of the chattel mortgage dated December 27, 1933, the original of which was introduced as Exhibit 3.

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Appellant.

State of Utah,
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named appellant with offices in Salt Lake City, Utah; that the offices for respondent's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah, and Lewistown, Montana; that affiant on October 30, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Designation of Portions of Record as Necessary For Consideration of This Appeal.

W. Q. VAN COTT

Subscribed and sworn to before me this 30th day of October, 1941.

[Seal]

SID. M. CORNWALL,
Notary Public Residing at Salt Lake City, Utah.

My commission expires: July 21, 1942.

13
BRIEF OF APPELLANT

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 9956

REGIONAL AGRICULTURAL CREDIT CORPORATION
OF SPOKANE, WASHINGTON, a corporation,
Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon
T. Douglas, deceased,
Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the
District of Montana, Great Falls Division.

HONORABLE CHARLES N. PRAY, *Judge.*

W. Q. VAN COTT,
D. EUGENE LIVINGSTON,

MASTIN G. WHITE,
Solicitor,
ROBERT K. McCONNAUGHEY,
Associate Solicitor
Farm Credit Division
THOMAS M. DARNALL,
Chief, Litigation Section
Farm Credit Division
ARTHUR C. BERNARD,
Attorney
Farm Credit Division

Office of the Solicitor
U. S. Department of Agriculture

FILED

DEC 29 1941

PAUL P. O'BRIEN,
CLERK

Attorneys for Appellant.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 9956

REGIONAL AGRICULTURAL CREDIT CORPORATION
OF SPOKANE, WASHINGTON, a corporation,
Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon
T. Douglas, deceased,
Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the
District of Montana, Great Falls Division.

HONORABLE CHARLES N. PRAY, *Judge.*

EXPLANATORY NOTE

Defendant in the court below appeals from a judgment against it. The parties are referred to herein as "plaintiff" and "defendant" and not as "appellant" and "appellee." Defendant will at times herein also be referred to as R. A. C. C. The decedent's name is sometimes shown as Simon Douglas and sometimes as Simon T. Douglas.

The case was commenced and filed in the United States District Court prior to the effectiveness of the new Rules of Civil Procedure for the District Courts of the United States. The pleadings also were filed prior thereto. The new rules became effective before the trial. The parties stipulated, in a stipulation filed January 11, 1940, (R. 115) that, subject

to the approval of the court, the new Rules of Civil Procedure for the District Courts of the United States should be applicable to all further proceedings in this case. The court approved the stipulation. (R. 118)

STATEMENT SHOWING JURISDICTION OF UNITED STATES DISTRICT COURT AND CIRCUIT COURT OF APPEALS

Jurisdiction is based upon Section 42, Title 28 U. S. C. A., Chapter 229, Section 12, Act of February 13, 1925, 43 Stat. at Large 941, which establishes jurisdiction in actions against a corporation incorporated by or under an act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

The action was commenced in the District Court of the Tenth Judicial District of the State of Montana for the County of Fergus against the Regional Agricultural Credit Corporation of Spokane, Washington and seeks damages in the sum of \$46,211.48. (R. 3.) The defendant is a corporation incorporated under an act of Congress. (R. 79, 91.) The Government of the United States is the owner of all of the capital stock of the defendant corporation. (R. 154.) Petition for removal to the United States District Court together with the statutory bond were filed with the Clerk of the Montana District Court for the County of Fergus within the time allowed for the defendant to make an appearance. (R. 15, 17, 18, 27.) The transcript on removal was filed with the Clerk of the United States District Court for the District of Montana, Great Falls Division, within thirty days after the filing of the petition and bond for removal. (R. 30.)

The appeal from the judgment of the District Court to the Circuit Court of Appeals for the Ninth Circuit is authorized by Section 225, Title 28 U. S. C. A.

STATEMENT OF THE CASE

Events preceding the commencement of the action.

Defendant was created by the United States Government for the strictly governmental purpose of making loans to livestock men, among others. (Appendix A.) Its stock always

has been wholly owned by the United States. (R. 154.) It is controlled and supervised by the Farm Credit Administration of the United States Government. (Appendix B.) Simon Douglas, plaintiff's intestate, on December 27, 1933, borrowed \$17,000.00 from defendant, evidencing such indebtedness by a promissory note (Exhibit 2, R. 162) and giving as security therefor a chattel mortgage, which contained a power of sale on default, on his sheep outfit. (Exhibit 3, R. 163.)

Simon Douglas died on January 12, 1935. (R. 82, 100.) The loan was then in default. (R. 83, 100.) There was little if any equity in the mortgaged property. (R. 178, 180.) It was necessary on account of the condition of the affairs of the intestate that R. A. C. C. advance funds to care for and feed the livestock. (R. 176.) In January, 1935, following the death of Simon Douglas, a representative of Dorothy Worthington, the only heir of Simon Douglas, had a conference with the management of R. A. C. C. in Helena, Montana, for the purpose of reaching a conclusion as to whether such heir would take over the decedent's sheep outfit and assume the debt. (R. 184.) The question was taken under advisement. On January 22, 1935, R. A. C. C., not having been advised by the heir as to her decision, wired to her:

“Have you made a decision regarding your father's Sheep Stop We must know definitely to enable us to decide what action advisable to protect our security.”
(R. 178.)

On January 23, 1935, the heir, Dorothy Worthington, wired to R. A. C. C. stating that she had decided not to take over the outfit and assume the indebtedness. (R. 180.)

No funds of the decedent were available to purchase feed and protect the sheep outfit. R. A. C. C. was under the necessity either of foreclosing the mortgage or of advancing further funds which would serve to increase the already existing deficit. (R. 178, 180.)

Thereupon R. A. C. C. commenced taking steps for the sale of the mortgaged sheep outfit under the power of sale contained in the mortgage. (R. 155-161.) Notice was given under the power of sale and pursuant to the statutes of the State of Montana. (R. 155.) The sale was conducted on Feb-

ruary 5, 1935. (R. 157.) No question has ever been raised as to the legality of the procedure for the foreclosure sale other than the contention that it violated Section 10140, Revised Codes Montana 1935, because sale was had before the appointment of a personal representative. In addition to the statutory notice R. A. C. C. caused letters to be sent to various possible prospective purchasers. (R. 190.) The sale was well publicized and well attended, there being approximately 75 persons present. (R. 210.)

The sale of the mortgaged outfit yielded \$15,002.10. (R. 159.) After deducting costs of sale there was a balance owing to R. A. C. C. on account of the indebtedness owing by Simon Douglas in the sum of \$1,694.64. (R. 161, 307.) Return of Sale was duly made and filed. (Exhibit 1, R. 155-161.)

Commencement of the Action.

On April 4, 1935, plaintiff was appointed administrator of the estate of Simon Douglas. This action was commenced in the Montana State court on the 27th day of May, 1935. (R. 15.) The original complaint set up the note and the mortgage, showing the power of sale, and sought damages to the extent of double the value of the property sold at the mortgage foreclosure sale. (R. 3-13.) The prayer was claimed to be pursuant to the provisions of Section 10140, Revised Codes Montana 1935, which provides that if any person *embezzles* or *alienates* any of the personal property of decedent prior to the appointment of a personal representative that such person is liable for double the value of the property so *embezzled* or *alienated*.

The District Court originally held that the Montana penalty statute was not applicable to this case.

The amended demurrer to the original complaint (R. 31-34) raised two questions: first, that the Montana penalty statute was inapplicable to this case because the mortgage contained a power of sale which was coupled with an interest and which therefore was irrevocable and not affected by the death of the mortgagor; and, second, that the Montana statute was inapplicable to a sale by a mortgagee which

acted in good faith under color of legal right and supposing that he had a right to enforce a lien thereon and who was not an intermeddler acting from wrong motives or in bad faith. These questions were fully argued and briefed to the court. (R. 36-72.) The court sustained the demurrer. (R. 35.)

After the trial the District Court reconsidered the question as to the applicability of the Montana penalty statute, concluded that it was applicable and rendered judgment against the defendant pursuant to such statute.

Following the sustaining of defendant's demurrer to the original complaint, plaintiff was given leave to amend. The amended complaint avoided the point of the demurrer and the court's decision thereon by merely alleging a conversion of the property and claiming double damages under the Montana penalty statute without setting up the mortgage or showing the power of sale. (R. 73.) Defendant filed an answer and cross complaint which set up the mortgage and power of sale. (R. 78.) Plaintiff filed a reply which set up the contention that the original mortgage dated December 27, 1933, under which the mortgage sale had been had, was supplanted and rendered *functus officii* by a new mortgage dated December 19, 1934, and that therefore the sale under the December 27, 1933 mortgage was invalid. (R. 100.) This contention was abandoned by stipulation filed January 11, 1940. (R. 115.)

Plaintiff requested and received permission to present once more to the court at the trial the question of the applicability of the Montana penalty statute. The only issue tried was whether the Montana penalty statute was applicable and if so the reasonable value of the property sold. Following the trial the parties once more submitted to the court briefs on the subject of the applicability of the Montana penalty statute. The court in its informal opinion reached the conclusion that the power of sale in the mortgage was coupled with an interest, to wit: the lien of the mortgage, that it was irrevocable and survived the death of the mortgagor. (R. 298.) The court, however, concluded that Section 10140, the Montana penalty statute, had the effect of temporarily suspending the power of sale during the period intermediate the death of the decedent and the appointment of a personal

representative; and that therefore the statute applied to this case. (R. 299.) The court found that the value of the property sold at the time of sale was \$17,000.00 and that the plaintiff was entitled to recover double that value, to wit: \$34,000.00; but that defendant was entitled to credits to the extent of the amount received from the sale of the property, \$15,002.10 and the deficiency judgment of \$1,694.64 and the costs of the sale in the amount of \$307.22 and ordered judgment against the defendant in the sum of \$16,633.17. (R. 307.)

The court, at the conclusion of the taking of evidence at the trial, did not state what the Findings of Fact, Conclusions of Law and Judgment would be, but kept the case open for the submission of briefs. The court in its informal decision dated February 20, 1941, stated that its decision would be for the plaintiff but still did not make Findings of Fact, Conclusions of Law or render Judgment. Plaintiff did not serve proposed Findings of Fact or Conclusions of Law or Judgment upon defendant prior to the same being signed by the court on March 5, 1941, nor did he serve notice of his intention to submit the same to the court for signature. No opportunity was accorded defendant to object to or make motions to amend the Findings of Fact and Conclusions of Law prior to the same being signed by the court. After the Findings of Fact and Conclusions of Law and Judgment were signed on March 5th (R. 307) they were served on defendant and defendant served and filed on March 12th Objections to and Motions to Amend the Findings of Fact and Conclusions of Law (R. 313) and also a Motion for New Trial (R. 309) and a Motion to Vacate Judgment for Plaintiff and to Enter Judgment for Defendant. (R. 311.) A hearing on such objections and motions was held on March 17, 1941, and thereafter briefs were submitted by both parties in regard to said objections and motions. All these motions were denied on July 16, 1941. (R. 327.)

The first question raised by defendant's brief is that the court erred in holding that the power of sale in the mortgage was suspended by the Montana penalty statute during the period intermediate the death of the mortgagor and the appointment of the personal representative and in applying the Montana penalty statute in the case.

This question is discussed in Section I of the brief. It is raised by Specifications of Error Nos. 1 to 6 inclusive.

If this court agrees with defendant's contention, such decision would entirely dispose of this case and necessitate a reversal of the judgment.

The second question raised by defendant's brief is that the Montana penalty statute cannot be applied in the absence, as in this case, of any evidence tending to prove fraud, bad motive or any intention wrongfully to deprive the estate of its assets.

No evidence was introduced at the trial showing or tending to show any fraudulent conduct on the part of defendant or any bad motive or any intention wrongfully to deprive the decedent's estate of its personal property. The court affirmatively stated in its informal opinion that the sale was honestly conducted. (R. 301.)

Defendant contends that the court erred in applying the Montana penalty statute in a case where the sale of the decedent's property was unaccompanied by fraudulent or wrongful conduct and where at most there was merely a mistake of law. This question is discussed in Section II of the brief. It is raised by Specifications of Error Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13. A determination of this question in favor of the defendant would entirely dispose of the case.

The third question raised by defendant's brief is that there was no evidence introduced in the case to support the finding of the court that the reasonable value of the property sold was \$17,000.00.

Most of the evidence introduced at the trial was directed to the issue of the reasonable value of the property sold at the foreclosure sale. This was because the District Court stated that it would reconsider the question of the applicability of the Montana penalty statute. A holding that the Montana penalty statute was applicable was the only contingency which would make material the evidence respecting the reasonable value of the mortgaged property sold. If this court con-

cludes that the Montana penalty statute is inapplicable or that the defendant cannot be subjected to a statutory penalty, then the finding of the court that the property sold was reasonably worth \$17,000.00 instead of \$15,002.10 is immaterial because no attack was made by the plaintiff either in the pleadings or at the trial against the honesty and fairness of the conduct of the sale. The finding of value is based upon the assumption that the statute is applicable.

Even if this court decides that the Montana penalty statute is applicable, defendant contends that there was no evidence introduced to sustain the finding that the reasonable value of the property sold was \$17,000.00 rather than \$15,002.10. This question is discussed in Section III of the brief. It is raised by Specifications of Error Nos. 4, 14, 15 and 16.

The fourth question raised by defendant's brief is that the court should have deducted the amount of the proceeds of the sale which were properly devoted before applying the penalty statute.

The court reached the amount of the judgment by finding the reasonable value of the property sold to be \$17,000.00, doubling that amount and then deducting the amount of the debt and costs of sale. (R. 307, 309.) It will be pointed out under Section IV of the brief, that the authorities hold that the personal representative is not damaged as to the proceeds of the sale of a decedent's assets which are devoted to a proper purpose because, if the defendant used the personal property of the decedent for the same purpose that the personal representative would have had to use it, no damage results. Accordingly, if the contention made under Section III of the brief is correct, the property sold for its full value and was properly applied in payment of the debt for which the property was mortgaged. There was no surplus and therefore no damage. If the court was correct in finding that the property sold for less than its reasonable value then the penalty statute could apply only to the difference. The question is raised by Specifications of Error Nos. 4, 14 and 15.

The fifth question raised by defendant's brief is that the Montana penalty statute may not be applied against the United States or an instrumentality thereof.

Defendant makes the contention that the Montana penalty statute may not be applied against the United States nor an instrumentality thereof. This question is discussed in Section V of the brief. It is raised by Specifications of Error Nos. 2, 3, 4, 17 and 18. A determination of this question in favor of the defendant entirely disposes of the case.

SPECIFICATIONS OF ERROR

The judgment entered in this case is erroneous for the following reasons:

1. The court erred in drawing the conclusion of law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that Section 10140, Revised Codes Montana, suspended the right of exercise of the power of sale contained in the chattel mortgage from the decedent Simon T. Douglas to defendant.

2. The court erred in drawing the Conclusion of Law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that defendant in making the sale of mortgaged property on February 5, 1935, was proceeding without right and contrary to law and subject to the penalty prescribed in Section 10140, Revised Codes of Montana 1935.

3. The court erred in drawing the Conclusion of Law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that pursuant to Section 10140, Revised Codes of Montana 1935, plaintiff is entitled to recover from defendant double the value of the property sold.

4. The court erred in drawing the Conclusion of Law, in the third unnumbered paragraph of the Court's Conclusions of Law (R. 307), that the plaintiff is entitled to a judgment of the court for the sum of \$16,633.17.

5. The court erred in denying defendant's motion in paragraph number 2 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is not applicable to a sale made under a power of sale in a mortgage such as that involved in this case.

6. The court erred in denying defendant's motion, made in paragraph number 14 of defendant's Objections to and Motions to Amend Findings of Fact (R. 316), that the court amend its Findings of Fact by finding that at the time of the seizure and sale of the mortgaged property the mortgage from Simon T. Douglas dated December 27, 1933, was in full force and effect; that the debt secured thereby was in default; and that said mortgage contained a power to sell the mortgaged property.

7. The court erred in denying defendant's motion, in paragraph number 3 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is inapplicable to a mortgagee acting in good faith under a power of sale.

8. The court erred in denying defendant's motion, made in paragraph number 4 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that the defendant in selling the mortgaged property was acting in good faith.

9. The court erred in denying defendant's motion, made in paragraph number 5 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, does not apply unless there is the intent wrongfully or fraudulently to deprive the estate, heirs or creditors of assets of the decedent's estate.

10. The court erred in denying defendant's motion, made in paragraph number 5 of Defendant's Objections to and Motions to Amend Findings of Fact (R. 314), to amend its Findings of Fact by finding that defendant in seizing and selling the property mortgaged to it by the decedent Simon T. Douglas did so openly and with notice to all persons concerned and that the acts of the defendant in that regard were without secrecy or concealment.

11. The court erred in denying defendant's motion, made in paragraph number 6 of defendant's Objections to and

Motions to Amend Findings of Fact (R. 315), that the court amend its Findings of Fact by finding that defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent Simon T. Douglas or attempting to divert the assets of his estate from those entitled thereto.

12. The court erred in denying defendant's motion, made in paragraph number 8 of defendant's Objections to and Motions to Amend Findings of Fact (R. 315), that the court amend its Findings of Fact by finding that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available.

13. The court erred in finding as a fact in paragraph number 5 of the Court's Findings of Fact (R. 304), that defendant was given actual notice before and at the time of the sale by responsible persons that the sale was illegal and that its attention was called to the fact that Simon T. Douglas was deceased and that no administrator had been appointed.

14. The court erred in finding as a fact, in paragraph number 7 of the Court's Findings of Fact (R. 305), that the property seized and sold by defendant was of the reasonable value of \$17,000.00.

15. The court erred in denying defendant's motion made in paragraph number 13 of defendant's Objections to and Motions to Amend Findings of Fact (R. 316), that the court amend its Findings of Fact by finding that the reasonable market value of the mortgaged property sold by defendant on February 5, 1935, was not in excess of \$15,002.10.

16. The court erred in finding as a fact in paragraph number 6 of the Court's Findings of Fact (R. 305), that the weather at the time of the sale was inclement and such as to make the time and date for the sale and disposition of the mortgaged property unfavorable.

17. The court erred in denying defendant's motion, made in paragraph number 15 of defendant's Objections to and

Motions to Amend Findings of Fact (R. 317), that the court amend its Findings of Fact by finding that the defendant is a corporation created by the United States; that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States.

18. The court erred in denying defendant's motion, made in paragraph number 9 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 318), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, provides for a penalty which cannot be imposed on the defendant because it is a corporation created and wholly owned by, and an instrumentality of, the United States.

SUMMARY OF ARGUMENT

I. The chattel mortgage from decedent to Regional Agricultural Credit Corporation, a wholly owned Governmental instrumentality of the United States, expressly granted a power of sale in the event of default, which occurred prior to his death. The law, established by the Supreme Court of Montana, is that a power of sale in a mortgage is coupled with an interest, which is part of the mortgagee's security and survives the death of the mortgagor. The District Court failed to follow this rule and decided that Section 10140, Revised Codes of Montana 1935, suspended the power of sale until the appointment of a personal representative. This was erroneous under the principle of *Erie Railroad Company v. Tompkins*. Also the decision of the District Court is contrary to law in that it permits a State statute to suspend a property right granted to an instrumentality of the United States Government.

II. The Montana penalty statute should be construed to be inapplicable unless there is a fraudulent element or unless the alienor is acting from a wrongful motive or with the intention of wrongfully depriving the estate of its assets. Such a construction is supported by a decision by the Supreme Court of Montana which construed another Montana penalty statute. It is also supported by the rule of construction *noscitur a sociis*. It complies with the elementary rule of construction

that penal statutes should be strictly construed. Similar statutes have been thus construed in Oregon, Vermont, Wyoming, Washington and Wisconsin, being all the jurisdictions in which the question has been discussed except Oklahoma. In Oklahoma early decisions to the contrary have been undermined.

III. The finding by the District Court that the reasonable value of the property sold at the foreclosure sale was in excess of the amount realized is not supported by any substantial competent evidence. The weighing of this evidence is necessary only if the court concludes as a matter of law that the Montana penalty statute is applicable.

IV. The defendant had a lien on all of the property sold. The personal representative would therefore have been under the necessity of applying this mortgaged property insofar as necessary to the payment of the mortgage debt. If the reasonable value of the mortgaged property was less than the debt, the sale caused no damage and under the law the Montana penalty statute would be inapplicable. If the property was reasonably worth in excess of the mortgage debt, the Montana penalty statute would be applicable only to such excess.

V. The defendant is part of the United States Government and may not be subjected to the imposition of penalties by the Montana statute.

ARGUMENT

I

SECTION 10140, REVISED CODES MONTANA, 1935, IS INAPPLICABLE TO A SALE MADE PURSUANT TO A POWER OF SALE. SUCH A POWER IS COUPLED WITH AN INTEREST, SURVIVES THE DEATH OF THE MORTGAGOR AND IS NOT SUSPENDED BY THE MONTANA STATUTE. A STATE STATUTE IS INCOMPETENT TO SUSPEND A RIGHT OF THE UNITED STATES OR ITS INSTRUMENTALITIES.

Section I is based upon Specifications of Error Nos. 1, 2, 3, 4, 5 and 6. If, as contended by defendant, the power of sale in the chattel mortgage was effective and was not suspended

between the death of Simon T. Douglas and the appointment of the administrator, then: (Spec. of Err. 1) the court erred in concluding that the power of sale was suspended by Section 10140, Revised Codes Montana 1935; (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of said Section 10140; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to judgment for \$16,633.17; and (Spec. of Err. 5) the court erred in refusing to conclude that said Section 10140 was inapplicable to a sale under a chattel mortgage with a power of sale. The first five Specifications of Error have to do with conclusions of law. If the proper conclusions of law were adopted, then the court should (Spec. of Err. 6) have found in accordance with the uncontradicted evidence that at the time of the seizure and sale of the mortgaged property the mortgage was in full force and effect (R. 82, 100, 115); that the debt secured thereby was in default (R. 83, 100); and that the mortgage contained a power of sale (R. 167). None of these specifications invokes this court's power to weigh the evidence.

The Statute

Section 10140, Revised Codes Montana 1935, reads as follows:

If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

The Power of Sale

The chattel mortgage in question (Exhibit 3, R. 163, 167) contains the following power of sale:

BUT IN CASE DEFAULT BE MADE in payment of the principal or interest as provided in said promissory note (or any thereof) then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns.

The debt secured by this mortgage was at the time of the seizure and sale in default. (R. 83, 100.)

The Supreme Court of Montana has squarely held that a power of sale in a trust deed is coupled with an interest, is part of the security of the mortgagee and survives the death of the mortgagor. *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621. The question was whether a power of sale in a real estate trust deed survived the death of the donor. The court answered the question as follows:

It was said by our own court, in *First National Bank v. Bell S. & C. M. Co.*, supra, "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land *that it becomes a part of the security and irrevocable.*" (Italics added.)

The authority of the *Muth* case has not been impaired.

The court in *Muth v. Goddard* relied upon Section 1792 of Jones on Mortgages. It is to be noted that Jones on Chattel Mortgages and Conditional Sales, Bowers Edition, Section 798, states the same rule with respect to a power of sale in a chattel mortgage:

The death of the mortgagor does not deprive the mortgagee of his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute. He is not required to file his claim in the administration proceedings, but he may proceed to foreclosure by notice and sale, just as he might have done had the mortgagor survived.

Further citation of authority could be made but seems unnecessary because the court in its informal opinion followed the *Muth* case in reasoning that under the Montana law the power of sale was coupled with an irrevocable interest and survived the death of the mortgagor. The court concluded, however, that Section 10140, Revised Codes Montana 1935, had the effect of suspending the power of sale intermediate the death of the decedent and the appointment of a personal representative.

The statute does not provide that it suspends any power of sale. It merely states that if a person embezzles or alienates personal property of a decedent he shall be subjected to double damages. It speaks wholly in terms of penalty and not at all in terms of suspending a power of sale.

No authority was cited by plaintiff or the court to the effect that Section 10140 suspends the power of sale.

Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the case of *Muth v. Goddard* should have been followed. It is not enough to render lip service to the doctrine by saying that the power of sale survived the death of the mortgagor and then nullify it by holding, without any supporting authority from Montana or elsewhere, that the power was suspended by a statute which does not say that the power is suspended. A power of sale that is suspended is no power of sale. It is useless. *Muth v. Goddard* says the power of sale survives death. The District Court said, "Yes, but you can't exercise it." *Muth v. Goddard* says the power of sale is part of the security. The District Court said, "but the security is taken away after the death of the mortgagor and before the appointment of a personal representative."

It was contended in the *Muth* case that permitting foreclosure under a power of sale was inconsistent with the Montana probate code. The court held that the power of sale was agreed upon by the parties and suspended the provisions of the probate code. On page 627 the court said:

It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be maintained. "The law may suspend its own process. As it gives the process, it may regulate it. But *deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.*" * * * It follows that the trustee or his successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected. (Italics added.)

The District Court in this case did just the opposite of what the *Muth* case says it should have done. *The court suspended the power of sale. It should have held that the voluntary act of the mortgagor in granting the power of sale suspended the penalty statute.* The decision of the District Court is not only supported by no authority but is entirely inconsistent with the reasoning and decision of the Supreme Court of Montana in the *Muth* case. This was error under the decision in the *Tompkins* case.

The decision of the court also failed to give effect to Section 8257, Revised Codes Montana 1935, which expressly authorizes powers of sale and which provides that the same may be exercised after a breach of the obligation for which the mortgage is a security. Section 8257 reads as follows:

Power of Sale. A power of sale may be conferred by a mortgage upon the mortgagee or any other per-

son, *to be exercised after a breach of the obligation for which the mortgage is a security.* (Italics added.)

The statute expressly provides that the power may be exercised after a breach of the obligation. It does not state any exception that such power cannot be exercised after grantor's death.

This statute does not expressly apply to chattel mortgages but has been held by the Supreme Court of Montana to be applicable thereto. *Kinsman v. Stanhope*, 50 Mont. 41, 144 Pac. 1083.

In the case of an instrumentality of the United States, such as R. A. C. C., the misapplication of the statute is even clearer because it has been held that State statutes are incompetent to deprive United States and its instrumentalities of any part of their security.

United States v. Summerlin, 310 U. S. 414, 84 L. Ed. 1283, 60 S. Ct. 1019 (1940). The Federal Housing Administrator became the assignee of a claim against the estate of J. F. Andrew, deceased, but failed to file it within the time prescribed by a Florida statute, which further provided that if it were not so filed, the claim was void. The court held that the State statute was inapplicable to a claim of the United States. On page 1020 the court said:

It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

On page 1021 the court said:

We hold that the state statute in this instance requiring claims to be filed within eight months *cannot deprive the United States of its right to enforce its claim*; that the United States still has its right of action against the administrator, even though the probate court is to be regarded as having no jurisdiction to receive a claim after the expiration of the specified period. (Italics added.)

The court regarded the claim assigned to the Federal Housing administrator as a claim of the United States. On page 1020 the court said:

The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

So in the case at bar the claim of the R. A. C. C. under its note and mortgage from Simon Douglas was the property of the United States of America. The right of the United States of America under its contract with the decedent, including the power of sale, could not be affected by Section 10140, Revised Codes Montana 1935.

Davis, Director General of Railroads v. Corona Coal Company, 265 U. S. 219, 68 L. Ed. 987, 44 S. Ct. 552. The Director General brought an action against the Coal Company for damage done to a railroad wharf while under Federal control. The Coal Company plead the Louisiana one year statute of limitations. The court held that it was inapplicable. On page 221 the court said:

In *E. I. Dupont DeNemours & Co. v. Davis*, 264 U. S. 456, 44 Sup. Ct. 364, 68 L. Ed. . . , April 7, 1924, it was held that the Director General was not barred by the statutes of the United States in an action on behalf of the United States in its governmental capacity to recover upon a liability arising out of his control. *The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided.* The reasoning of that case excludes the notion that there was any intentional waiver by the United States of its sovereign right to collect its claims, irrespective of any statute, "as soon as practicable." (Italics added.)

In the case at bar R. A. C. C. chose to take steps to foreclose its mortgage in its own name. It would have been perfectly proper for the United States to have brought an action for the foreclosure of the mortgage, as was done in *United States v. Summerlin*, supra.

Reconstruction Finance Corporation v. Krauss, 12 Fed. Supp. 44 (D. C. N. J.)

North Dakota-Montana Wheat Growers' Ass'n v. U. S., 66 Fed. (2d) 573 (8th C. C. A.)

II

THE MONTANA PENALTY STATUTE, SECTION 10140 REVISED CODES MONTANA 1935, IS A HIGHLY PENAL STATUTE, AND SHOULD NOT HAVE BEEN APPLIED TO THE CASE AT BAR BECAUSE THERE WAS NO EVIDENCE THAT THE SALE OF THE MORTGAGED ASSETS WAS FRAUDULENT OR PURSUANT TO ANY WRONGFUL MOTIVE OR FOR THE PURPOSE OF WRONGFULLY DEPRIVING DECEDENT'S ESTATE OF ITS ASSETS.

Section II is based upon Specifications of Error Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13. If, as contended by defendant, Section 10140, Montana Revised Codes 1935, is inapplicable where there is no fraudulent conduct, no wrongful motive and no purpose wrongfully to deprive the estate of its assets, then: (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of Section 10140; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to judgment for \$16,633.17; (Spec. of Err. 7) the court erred in refusing to conclude that said Section 10140 is inapplicable to a mortgagee acting in good faith under a power of sale; (Spec. of Err. 8) the court erred in refusing to conclude that defendant in selling the mortgaged property was acting in good faith; (Spec. of Err. 9) the court erred in refusing to conclude that said Section 10140 does not apply unless there is the intent wrongfully or fraudulently to deprive the estate, heirs, or creditors of assets of the decedent's estate. The above Specifications of Error have to do with conclusions of law. If the proper conclusions of law were adopted then the court should have found in accordance with the uncontradicted evidence (Spec. of Err. 6) that at the time of the seizure and sale of the mortgaged property the mortgage was in full force and effect (R. 82, 100, 115), the debt secured thereby was in default (R. 83, 100), and the mortgage contained a power of sale (R. 167); (Spec. of Err. 10), that defendant in seizing and selling the mortgaged property did so openly and

with notice to all persons concerned and that the acts of defendant were without secrecy or concealment; (Spec. of Err. 11) that defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent, Simon T. Douglas, or attempting to divert the assets of his estate from those entitled thereto; (Spec. of Err. 12) and that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available. Specifications of Error 6, 10, 11 and 12, although dealing with questions of fact, do not invoke the court's power to weigh the evidence because they are supported by the uncontradicted evidence in the case. In addition to the foregoing this section of the brief deals with Specification of Error 13 in making the contention that the statements and claims made at the time of the sale were wholly immaterial because they were not shown to have been made by any persons connected with the estate or heirs or creditors.

Section 10140, Revised Codes Montana 1935, is a highly penal statute, not in any sense remedial.

Springer v. Jenkins, 47 Ore. 502, 84 Pac. 479,

Roy v. Roy, 13 Vt. 543, (1841)

Delfelder v. Poston, 42 Wyo. 176, 293 Pac. 354.

It is the law as announced in Oregon, Vermont, Washington and Wyoming that penalty statutes such as the Montana statute are inapplicable in the absence of fraud, wrongful motive or wrongful abstraction of assets from a decedent's estate. In Wisconsin the same result has been reached.

Springer v. Jenkins, 47 Ore. 502, 84 Pac. 479
(1906).

Here, defendant sold decedent's sheep after decedent's death and before appointment of a personal representative, yet the Oregon penalty statute was not applied. The court concluded that the foreclosure action and sale were premature because the debt was not due but that the defendant, though ill advised, did not act wrongfully or in bad faith or

from wrong motives and concluded that the penal statute was inapplicable. On page 481 the court said:

But, however, this may be, we are of the opinion that section 1152 does not apply to a case where the defendant acted in good faith under color of legal right, supposing he had title to the property or a right to enforce a lien thereon, though he should subsequently be unable to establish such title or right. *The statute is highly penal in its consequences, and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages;* and its language should, we think, be so construed. To subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. (Italics added.)

In the following two Vermont cases defendants alienated personal property of decedents after death and before appointment of personal representatives, yet the Vermont penalty statute was not applied.

Batchelder v. Tenney, 27 Vt. 578 (1855).

Defendant, claiming to be a joint owner in certain personal property of a decedent, caused the same to be sold. The court, quoting the Vermont statute, substantially identical with the Montana statute, held that it was inapplicable because the sale was not with the intent of wrongfully abstracting the property from the estate. The court said:

We think, to bring a case within this section of the statute, the act complained of must, at least *be done with the intent of wrongfully abstracting the property from the estate of the deceased, to the injury of its assets.*

Roys v. Roys, 13 Vt. 543 (1841).

The defendant used and disposed of certain pork, bacon, rum and codfish which had belonged to a decedent. Plaintiff

sued under the penal statute, which is substantially identical with the Montana statute. The court, on page 548, said:

* * * The statute, subjecting the party to pay double the value of the property, is highly penal in its consequences, and *should not be applied to a case where he acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise.* To subject the defendant to the penalty, he must have acted from a wrong motive, and *mala fide.* (Italics added.)

This case contains an interesting discussion of the historical significance of this statute, which in the beginning was a legislative limitation of the severe consequences imposed upon an executor *de son tort.*

Delfelder v. Poston, 42 Wyo. 176, 293 Pac. 354 (1930).

This case contains the most exhaustive discussion of the question that has come to our attention. It holds that the Wyoming statute, substantially identical with the Montana statute, is inapplicable in a case where the alienor was acting innocently and not fraudulently.

After a full review of all the authorities, including those from Oklahoma, California, Wyoming, Oregon and Vermont, the court reached the following conclusion:

We think it may fairly be deduced from the preponderance of authority that, in order to be subjected to the liability imposed by section 6830, *supra*, the person who "alienates" property of an estate must *wrongfully transfer the same, acting in that respect from a wrong motive and mala fide.* (Italics added.)

Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857 (1912). The defendant Lamar claiming the decedent had made a gift *inter vivos*, exercised dominion over assets of decedent prior to the appointment of a personal representative. The court held he had not made such a gift. The personal representative asked for double damages under the Washington penalty statute. On page 861 the court said:

Respondent's second contention is based upon Section 1460, Rem. & Bal. Code; "If any person before the granting of letters testamentary or administration shall embezzle or alienate any of the moneys, goods, chattels or effects of any deceased person, he shall stand chargeable, and be liable to the action of the executor or administrator of the estate, in double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate." David Lamar came into possession of this property under a claim of ownership. *His possession was therefore an innocent one, and he could not be held as for an embezzlement.* Beckman v. McKay, 14 Cal. 250. (Italics added.)

Merrill v. Comstock, 154 Wis. 434, 143 N. W. 313, (1913).

Section 3824 Laws of Wisconsin 1898 provided that if any person, before the granting of letters testamentary or of administration, shall embezzle or convert to his own use any personal property of any deceased person, such person shall be liable for double the value of the property so embezzled or converted. The defendant, following the death of her husband, secured a deposit belonging to him from a bank and also an amount owing to him from a corporation. The plaintiff was appointed administrator and sued to recover double the sums converted. Defendant set up that the assets of the decedent so secured by her were paid out for necessary funeral expenses and expenses of last sickness. A demurrer to the answer was sustained and the defendant appealed. The court held that the answer stated a good defense.

Although the Montana Supreme Court has not passed upon this question with respect to Section 10140, it has decided with respect to another Montana penalty statute for conversion that penalty statutes are not applied generally, even though general language is used, but only if there are present certain elements justifying the imposition of the penalty.

McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668 (1894).

A Montana statute, now Section 9476 Revised Codes Montana 1935, provided treble damages for the conversion of logs

or timber. Plaintiff contended that he need not allege or prove malice, wantonness or evil design because the language of the statute applied generally to any conversion. The court held that the statute does not apply to an ordinary conversion but only when the defendant has been guilty of willfulness, malice, wantonness or evil design. Said the court:

According to the view of the circuit judge, the statute applies to every case of the conversion of logs, timber, or lumber floating in any of the waters of this state, or lying on the banks or shores of such waters, or on any island where the same may have drifted, and gives treble damages as the measure of recovery. It seems to us that this is an unreasonable and unsound construction of the provision, *True, the language used is general and, if literally interpreted, would include any conversion.* But, says an acknowledged authority on this subject, in interpreting a statute it is not always a safe rule, or a true line of construction, to decide according to the strict letter of the act, but courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. *Qui haeret in litera haeret in cortice.* Broom, leg. Max. p. 536. *Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not. It is needless to observe that the law is highly penal in its character.* By way of punishment it subjects the wrongdoer in certain cases to an extraordinary liability for the property of another appropriated to his use. In some cases the conversion may be merely a technical one in law, arising from accident, mistake, or even carelessness, without any evil design, and where the damages recoverable at common law afford an adequate compensation to the party injured." (Italics added.)

The decision of the Supreme Court of Montana in the *McDonald* case is supported generally by the authorities.

Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615,
Menasha Woodenware Co. v. Spokane International
Ry. Co., 19 Ida. 586, 115 Pac. 22,
Stewart v. Sefton, 108 Cal. 197, 41 Pac. 293,
Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 Pac. 294.

Statutes imposing multiple damages are penal in character and should be strictly construed against the imposition of the penalty. Statutes imposing multiple damages are penal in character, 17 *Corpus Juris*, 997. It is elementary that statutes are strictly construed against the imposition of the penalty.

Cooley's Blackstone, Fourth Edition, Vol. 1, page 80, paragraph 8, reads as follows:

Penal statutes must be construed strictly.

24 *Corpus Juris* 1217:

The rule of strict construction is applied to statutes providing a penalty for intermeddling with the estate of a decedent.

65 *Corpus Juris* 157:

Statutes imposing double damages are penal in nature and will be strictly construed so as to avoid the imposition of such damages where the case is not within the evident purpose of the statute.

The construction of the penalty statute adopted by Wyoming, Oregon, Vermont, Washington and Wisconsin is supported by the rule of construction *noscitur a sociis*.

The statute aims at a weakness in human nature which has often resulted in the personal property of decedents being wrongfully appropriated. The diversions have sometimes been caused by persons wrongfully taking property and themselves using it and at other times by wrongfully disposing of the property. In the statute embezzlement covers the first classification and alienation the other. Embezzlement is used to include one kind of wrongful disposition. Alienation is used to cover another kind of wrongful disposition. It seems unthinkable that the legislature intended that for one kind of disposition, in order for the statute to apply, fraudulent or criminal

intent is essential, but that for the other kind of disposition fraudulent or criminal intent is unnecessary and that the statute applies regardless of good faith and innocence. If the legislature intended that the statute would apply only if there is a criminal or fraudulent element as to one kind of disposition, then it would presumably intend that there should be a like element as to the other.

The word "embezzle" necessarily involves the element of fraudulent intent. *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857 (1912). It is submitted that a correct construction of the statute requires fraudulent intention for the other kind of disposition, alienation. The case at bar seems perfect for application of the rule of construction *noscitur a sociis*, well established by the Supreme Court of Montana and other courts.

State v. Moran, 24 Mont. 433, 63 Pac. 390 (1900).

The question was whether the Montana Supreme Court had jurisdiction to grant an injunction against the use of a certain political party name in a purely political controversy. The decision turned upon the meaning of the word "injunction" used in the constitutional grant of jurisdiction in association with the words "writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction." On page 392 the court said:

* * * *Noscitur a sociis* is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. "Copulatio verborum indicat acceptionem in eodem sensu." Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain by its certain associates.

Accord, *Northern Pacific Railway Co. v. Sanders County*, 66 Mont. 608, 214 Pac. 596; *Young v. Board of Trustees, etc.*, 90 Mont. 576, 4 Pac. (2d) 725 (1931).

An instructive case is *Nettles v. Lichtman*, 228 Ala. 52, 152 So. 450, 91 A. L. R. 1455. A deed granted the right to trees and timber. The question was whether this included trees too small for timber but useful for wood pulp. The word "trees" standing alone undoubtedly would have included the wood pulp trees. Its association with the word "timber" induced the court to hold that the words did not include the wood pulp trees. On page 1461 A. L. R. the court said:

There is a well-known and ancient maxim, *noscitur ex sociis*—the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it—broader in its scope than the kindred maxim, *ejusdem generis*, which has been given frequent application by this court.

So in the case at bar the association of the word "alienate" with the word "embezzle" affects the meaning of "alienate" and limits its application to cases where there is fraudulent or criminal conduct and excludes its application to cases where defendants acted in entire good faith.

The Supreme Courts of California and Oklahoma have also dealt with statutes similar to the Montana penalty statute.

Jahns v. Nolting, 29 Cal. 507,

Litz v. Exchange Bank of Alva, 15 Okl. 564, 83 Pac. 790 (1905),

Aultman and Taylor Machinery Co. v. Fuss, 86 Okl. 168, 207 Pac. 308 (1922),

Sauls v. Whitman, 171 Okl. 113, 42 Pac. (2d) 275 (1935),

Shawnee National Bank v. Van Zant, 84 Okl. 107, 202 Pac. 285 (1921),

Nichols & Shephard Co. v. Dunnington, 121 Okl. 213, 247 Pac. 353 (1926),

In re Wagner's Estate, 178 Okl. 384, 62 Pac. (2d) 1186.

The California case does not hold contrary to defendant's contention. The original Oklahoma case applied the statute more broadly than other jurisdictions but has been substantially undermined by the later cases.

The conduct of defendant at bar was entirely inconsistent with the imposition of the statutory penalty.

The conduct of defendant following the death of the decedent was consistently frank, open and above board. The sole heir of the decedent was accorded the opportunity of taking over the mortgaged outfit and making satisfactory financial arrangements with defendant. (R. 185.) A conference was arranged and conducted between defendant and the representative of said heir. (R. 185.) The heir did not announce her decision. Defendant was considerate enough to wire to her to find out what decision she had made. (R. 178.) She wired back that she was unwilling to take over the property and assume the obligation. (R. 180.) There was nothing surreptitious or clandestine in defendant's conduct. There is no evidence and no contention by plaintiff that defendant hid any property, concealed any property or removed any property. There is not the slightest suggestion that defendant acted maliciously, wantonly or from evil design. The only suggestion made by the court in its informal opinion and Findings of Fact and Conclusions of Law is that defendant was notified at the time and place of sale by a lawyer and a banker that the sale was claimed to be illegal because an administrator had not been appointed. These persons were not shown to have any relation to the estate, the heirs or the creditors. For aught that appears they were mere intermeddlers. If they had been more, it may be assumed that they would not have waited until the sale was beginning but would have at least given notice of objection in advance of the fact that interested parties objected to the sale, or, more likely, have sought to enjoin the sale. It would not have been a trivial thing to postpone the sale at the time when the suggestion of illegality was made. Notice, both formal and advertising, had been given. Approximately seventy-five persons were present, including many substantial prospective bidders. It would have been seriously detrimental to the liquidation to have postponed. This conduct is not bad faith that is essential in order for the penalty statute to be applied.

The argument that the sale, in spite of the assertions made by the banker and lawyer, constituted bad faith begs the question of whether defendant was rightfully exercising

the power of sale contained in the mortgage. The District Court, when it sustained the amended demurrer to the original complaint held that the defendant acted rightfully and within its power of sale. After the trial the court changed its opinion in this respect. If the District Court had adhered to its original opinion the sale would have continued under the law of the case to be lawful. Does a change in the court's opinion on a question of law make an act fraudulent or in bad faith within the meaning of the authorities? Even if defendant were incorrect in its understanding of the law, it was merely a mistake of law. As has been shown, it does not constitute bad faith within the meaning of the statute.

III

THERE IS NO SUBSTANTIAL EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT THE REASONABLE VALUE OF THE PROPERTY SOLD WAS \$17,000.00. THE EVIDENCE CONCLUSIVELY AND WITHOUT CONTRADICTION SHOWS THAT THE PROPERTY SOLD FOR ITS FULL VALUE, \$15,002.10.

Section III is based on Specifications of Error Nos. 4, 14, 15 and 16. Specifications of Error 14 and 15 invoke the court's power to examine the evidence by contending that (Spec. of Err. 14) the court erred in finding that the property seized and sold by defendant was of the reasonable value of \$17,000.00 and (Spec. of Err. 15) that the court erred in failing to find that the reasonable market value of the mortgaged property was not in excess of \$15,002.10. It would follow (Spec. of Err. 4) that the court erred in concluding that the plaintiff was entitled to judgment for \$16,633.17. Herein also is discussed Specification of Error 16 that the court erred in finding that the weather at the time of sale was inclement and such as to make the time and date for the sale and disposition of the mortgaged property unfavorable because such finding is immaterial.

If the court concludes that Section 10140 of the Montana 1935 Code is inapplicable to the case at bar, then all of the evidence introduced at the trial of the case on the issue of

the reasonable value of the property sold becomes immaterial. No attack was made upon the legality of the mortgage foreclosure sale either in the pleadings or at the trial other than the question as to the Montana penalty statute. Merely because the trier of the facts reaches the conclusion that the reasonable value of the property sold is \$17,000.00, whereas the foreclosure sale yielded \$15,002.10, is not a legal reason for upsetting the sale and substituting the opinion of the trier of the facts. A chattel mortgage cannot be set aside merely because the price received is regarded as inadequate. *Exchange State Bank v. Occident Elevator Co.*, 95 Mont. 78, 24 Pac. (2d) 126, 90 A. L. R. 740.

However, if the Circuit Court of Appeals should find that Section 10140 is applicable to the case at bar, then it is defendant's contention that the evidence shows without conflict that the property was sold for its full reasonable market value.

The finding of the court that the reasonable value of the property sold was \$17,000.00 rather than \$15,002.10 is not based upon any substantial evidence and should be set aside. The only reason stated by the court either in the informal opinion or in the findings or conclusions was that the sale was held under unfavorable conditions. (R. 301, 305.) There is no evidence whatsoever that the weather in any way affected the prices received. It is true that there is evidence that the weather was cold and a wind was blowing. That, however, is commonplace in the State of Montana in February. It is submitted that the defendant was not under the necessity of paying for feed and for herders to take care of these sheep until a warm day. Moreover, when notice of sale is given one cannot know in advance what the weather conditions will be. The evidence shows conclusively and without contradiction that the sale was very well attended. Approximately 75 persons attended. (R. 210.) Many substantial prospective bidders, able and willing to bid, attended the sale. (R. 210.) The bidding was spirited and in many cases the various lots brought more than competent witnesses considered them to be worth. For these reasons, as asserted in Specification of Error No. 16, the court erred in finding that the weather was

inclement and that the sale was held under unfavorable conditions.

The evidence shows conclusively and without contradiction that the sale brought the full market value of the mortgaged property.

The allegation of the amended complaint is that the property was of "the value of \$31,500.20." Market value is not alleged. The action is for conversion. The measure of damages is the market value of the property at the time and place of the conversion. The issue for consideration is the *market value* of the property. *James v. Speer*, 69 Mont. 100, 220 Pac. 535. Market value has been defined by the Supreme Court of Montana in the case of *State v. Lee*, 103 Mont. 482, 63 Pac. (2d) 135 to mean:

* * * The actual value mentioned in the statute is the "market value"; that is, the price that in all probability would result from fair negotiations where the seller is willing to sell and the buyer desires to buy. Accord: *Rider v. Cooney*, 94 Mont. 295, 23 Pac. (2d) 261
State v. Hoblitt, 87 Mont. 403, 288 Pac. 181
Mont. Ry. Co. v. Warren, 6 Mont. 275, 12 Pac. 641

Defendant produced the very best possible evidence of market values. It introduced not only the opinion of disinterested witnesses, qualified to express opinions, who attended the sale and saw the mortgaged property but also evidence of a public sale of which adequate public notice was given, intelligently and fairly conducted, and which was attended by many substantial persons desirous of buying and able to pay.

The sales of property were as follows:

Band of 1453 ewe lambs sold at \$4.10 per head for . . .	\$ 5,957.30
Old band of ewes, 1080 head sold for \$2.25 per head for	2,430.00
Young band of ewes, 1238 head, sold for \$3.40 per head, for	4,205.80
21 head of horses, sold for	860.00
308 sacks of molasses cake sold for \$1.30 per sack for	400.40

236 cut-back lambs and ewes with some old bucks for	110.00
Miscellaneous machinery, tools, wagons, saddle bags, saddles, tents, pelts, etc., for	435.00
46 tons of old hay sold at \$2.10 per ton for.....	96.80
800 pounds of oats sold at \$1.50 per hundred for....	12.00
Miscellaneous oats, hay and blue joint sold for \$4.25 per ton, for	495.00
Total	<u>\$15,002.30</u>

The foregoing items total \$15,002.30. However, the return of sale and the findings of fact all show the total to be \$15,002.10.

The Lambs sold for their full market value at \$4.10 per head. John G. Cameron was of the opinion that this was more than their market value; that the market value was between \$3.50 and \$4.00 per head. (R. 280.) W. E. Robinson was of the opinion that the lambs sold for all they were worth and that \$4.10 was a big price. (R. 255.) William Ragan was of the opinion that the market value of the lambs was \$3.50 per head and he discontinued bidding at that point. (R. 268.) J. A. Robinson was of the opinion that the market value of the lambs was \$3.00 to \$3.25 per head. (R. 217.) The deceased, Simon Douglas, in the application for the loan, showed the lambs to be worth \$3.00 per head. (R. 244.) R. I. Balch and M. W. Wildschults and other substantial buyers adequately financed to purchase were present but permitted Daley Johnson to buy the lambs at \$4.10 per head. (R. 277, 284.)

Old band of 1080 head of ewes sold for their full market value at \$2.25 per head. This band had so many aged ewes that Cameron and Balch were not interested. (R. 280, 284.) W. E. Robinson thought that \$2.25 a head was a very fair value. (R. 255.) William Ragan was of the opinion that the market value for these ewes was \$2.00 per head and he stopped bidding at that point. (R. 268.) J. A. Robinson was of the opinion that they sold for their market value. (R. 213.) M. W. Wildschults, adequately financed, stopped bidding five or ten cents below the sale price. (R. 277.)

Young band of 1238 ewes sold for their full market value at \$3.40 per head. John G. Cameron was of the opinion that the market value of these sheep was from \$3.00 to \$3.50 per head. (R. 280.) R. I. Balch stopped bidding at \$3.30 or \$3.35 per head because he thought that was all they were worth. (R. 284.) W. E. Robinson thought \$3.40 was a fair price. (R. 256.) William Ragan with Henry Lingshire was the successful bidder.

21 head of horses sold to M. W. Wildschults for \$860.00. He resold them in parcels over a period of a month or two and lost \$50.00 on the transaction. (R. 278.) Plaintiff made no contention that this was less than their full market value.

Molasses Cake, 308 one hundred pound sacks sold at \$1.30 per sack. Plaintiff contends that the market value was \$40.00 a ton, which would be \$2.00 a sack or a difference of \$215.60, a negligible item. There is an adequate explanation for the failure of the sale of the molasses cake to bring a higher price. As W. E. Robinson testified, either you want it at the time or you don't. (R. 257.) It is an emergency feed, usually purchased early in the winter season so that it will be on hand in an emergency. The season of its necessity was almost over. A purchaser would have to move it and keep it until the following winter. (R. 214.)

236 cut back lambs and ewes with some old bucks. These sold to Tom Wight for \$110.00. They were what was called the "hospital" end of the outfit, meaning that they were weak or ailing and had to have special attention. Cut back lambs are small lambs that have not done well and need extra care and are placed in what is called a "hospital." (R. 215.) This item was so unattractive that the autioneer had more difficulty in selling it than anything else. He had to plead with Tom Wight to get him to take them. (R. 215.) Tom Wight was able to do something with them because he was on the ground in charge of the outfit. (R. 215.) Plaintiff made no contention that the full market value was not secured.

Machinery, tools and equipment. The machinery, tools and equipment sold for \$410.00. It consisted of old used tools, hay machinery, an old tractor, an old car, some wagons and

a sheep camp, all badly run down. (R. 215.) No further discussion will be made because plaintiff made no contention that this was less than the fair market value.

46 tons of old hay was sold at \$2.10 a ton. This was two and three year old hay, almost entirely cheat grass, which is the poorest kind of feed. The age of the hay makes it deteriorate. (R. 216.) Here again no question was made by plaintiff that this hay sold for less than its value.

90 tons of oat hay and blue joint hay sold at \$4.25 per ton. J. A. Robinson bought this in for the Regional Agricultural Credit Corporation and later succeeded in selling it for \$5.50 per ton and gave credit for the extra \$1.25 per ton to the Simon Douglas estate. (R. 216.) The hay was pretty good feed up until the first of the year when the mice got to working so hard on it. (R. 217.) Here again the plaintiff made no complaint about the price received for this hay.

800 pounds of oats sold for \$12.00 or at the rate of \$1.50 per hundred. No complaint was made by plaintiff regarding the price received for these oats.

Plaintiff produced no competent evidence on market value.

The witnesses produced by defendant on the issue of market value all attended the sale and participated in the sale. They were not dealing with theoretical values but with actual commodities and dollars. Contrast that with the witnesses produced by the plaintiff—**Hal Clement, George Yeager, Frank Birkinbine and Joe C. King**. Not one of them attended the sale. Not one of them participated in the sale. Not one of them backed his judgment with cash. Hal Clement admitted that he didn't have any opinion about market value. (R. 123.) George Yeager was unable to describe to the court the property concerning which he attempted to express an opinion. (R. 131-133.) Frank Birkinbine had no knowledge whatever of the outfit except that he purchased from Daley Johnson and O. A. Nepstad the aged ewes in the band of 1080. (R. 139, 140.) Joe C. King's only knowledge of the outfit was that he drove out to the place and spent about half an hour in looking over the outfit without even getting out of his car and without mouthing any of the ewes. (R. 144-148.)

IV

IT IS UNDISPUTED THAT DEFENDANT HAD A FIRST LIEN ON THE PROPERTY SOLD AND WAS ENTITLED TO THE PROCEEDS THEREOF UP TO THE EXTENT OF THE DEBT OWING. IF THE PROPERTY SOLD FOR ITS FULL VALUE PLAINTIFF WAS NOT DAMAGED BECAUSE NOT ENOUGH WAS REALIZED TO PAY DEFENDANT'S DEBT. IF IT SOLD FOR LESS THAN ITS FULL VALUE THE DAMAGE IS ONLY THE DIFFERENCE BETWEEN THE SALE PRICE AND THE FULL VALUE AND THE PENALTY SHOULD BE APPLIED IF AT ALL ONLY TO SUCH DIFFERENCE.

Section IV is based on Specifications of Error Nos. 4, 14 and 15. If, as contended by defendant in Specifications of Error Nos. 14 and 15, the property sold for its full value, plaintiff was not damaged and the court erred in concluding (Spec. of Err. 4) that the plaintiff was entitled to a judgment for \$16,633.17. If the property sold for less than its full value the judgment should be only for double the difference between the sale price and the full value.

Merrill v. Comstock, 154 Wis. 434, 143 N. W. 313 (1913).

Section 3824 Laws of Wisconsin 1898 provided that if any person, before the granting of letters testamentary or of administration, shall embezzle or convert to his own use any personal property of any deceased person, such person shall be liable for double the value of the property so embezzled or converted. The defendant, following the death of her husband, secured a deposit belonging to him from a bank and also an amount owing to him from a corporation. The plaintiff was appointed administrator and sued to recover double the sums converted. Defendant set up that the assets of the decedent so secured by her were paid out for necessary funeral expenses and expenses of last sickness. A demurrer to the answer was sustained and the defendant appealed. The court held that the answer stated a good defense. On page 315 the court said:

* * * It was also well settled that in such an action the executor de son tort was entitled to be cred-

ited with lawful claims against the estate which he had discharged, and that the plaintiff must, in order to recover, show a loss or damage to the interest which he represented occasioned by the unlawful act. For illustration: If the intermeddler had paid out all of the estate which came into his hands in discharge of a valid preferred claim against the estate, the general creditor suing or the administrator plaintiff who represented only such general creditors of the second class and legatees or heirs could not recover.

* * * Disregarding rules based upon the form of action, it is safe to say that this common-law rule rested primarily upon the consideration that the plaintiff was not damaged by such act of the third person.

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* * * If the answer shows that no damage has been done to the estate or to the administrator in this capacity, there is no legal wrong under section 3259, supra. The law does not insist upon the idle ceremony of collecting this money from the widow for the purpose of repaying it to the same persons to whom she has already paid it. Nor has she made it available to the general creditors by such payment. Nor does equity take money away from any person at the suit of a trustee for an inferior class of creditors where such person would be by that same payment entitled by subrogation to the status of a preferred creditor. Having applied the assets of the estate in payment of these preferred claims, neither creditors of the second class nor heirs were aggrieved by such payment.

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* * * The title of executor de son tort may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate.

In *Delfelder v. Poston*, 42 Wyo. 176, 293 Pac. 354 (1930), discussed supra, it appeared that the proceeds of the aliena-

tion were applied in reduction of the mortgage debt and to an extent greater than the true value of the property alienated. The court, after an extensive review of the cases on this subject, on page 363 said:

* * * Unquestionably the mortgaged property necessarily had to be applied first to the payment of that indebtedness. No estate creditors could have the slightest claim upon it, unless the price paid therefor and credited upon the debt was less than its real value. The trial court's finding forecloses here any such question as that. It follows, therefore, as the matter stands in this court, that no injury whatsoever has been inflicted upon either the plaintiff or the estate, but the transaction was in the interest of both.

Rutherford v. Thompson, 14 Ore. 236, 12 Pac. 382.

The plaintiff as administratrix sued the defendant for conversion and wrong doing in connection with certain buggies manufactured and owned by plaintiff's decedent. Defendant showed that the proceeds of the buggies were applied in payment of debts of the deceased. The court held that this was a proper defense. On page 384 the court said:

* * * But if this be considered doubtful, the acts complained of must be treated with reference to their beneficial or injurious character. To deprive the defendant, under the facts, of the right to give such payment in evidence, in mitigation of damages, would certainly be rank injustice. If they are debts which the rightful representative would be bound to pay in due course of administration, they create an equity against the estate; they are not injurious, but must be considered as beneficial, making it competent for the defendant to give such payments in evidence which operated by way of recoupment. * * *

These principles of law we believe still to be applicable in determining the liability of the defendant to the plaintiff as administratrix; that in such action it is not material whether the defendant be treated as an executor *de son tort* or a wrong doer,—the liability

in either case, to account to the executor or administrator, is the consequence of the same act, and is the same, and must be governed by the same principles of legal justice; and, finally, that the justice of the law remains unaffected, to be applied and administered accordingly as the defendant has injuriously or beneficially acted with reference to the estate.

The court found that the reasonable value of the property sold was \$17,000.00. The property actually sold for \$15,002.10. Under the doctrine of the foregoing cases and assuming that the finding of the trial court is upheld, the measure of damages would be the difference between \$17,000.00 and \$15,002.10, \$1997.90 minus the deficiency owing to defendant, \$1694.64, which would leave \$303.26, doubled by the statute, would amount to \$606.52. If, however, this court sustains defendant's contention that the finding of the trial court that the property was of a reasonable value of \$17,000.00 cannot be upheld and that the property was of a reasonable value of only \$15,002.10, which is less than the amount of the debt owing, then under the doctrine of the foregoing cases the plaintiff was not damaged at all and there can be no recovery.

V

DEFENDANT IS A WHOLLY OWNED GOVERNMENTAL INSTRUMENTALITY OF THE UNITED STATES AND IS NOT SUBJECT TO THE PENALTY PROVISIONS OF THE MONTANA STATUTE.

Section V is based on Specifications of Error Nos. 2, 3, 4, 17 and 18. If, as contended by defendant, the Montana penalty statute cannot be applied against an instrumentality of the United States Government, then: (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of Section 10140, Revised Codes Montana 1935; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; and (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to a judgment for \$16,633.17. If such proper conclusions of law had been

adopted then the court should have found in accordance with the uncontradicted evidence that: (Spec. of Err. 17) defendant is a corporation created by the United States (Appendix A), all of the stock of such corporation was and is owned by the United States (R. 154) and it is an instrumentality of the United States. (Appendix A.) Pursuant to such findings of fact the court should have concluded (Spec. of Err. 18) that said Section 10140 cannot be imposed on the defendant because it is a corporation created, wholly owned by and an instrumentality of the United States.

Penalties may not be imposed against Governmental Instrumentalities or the exercise of governmental functions by the United States.

Missouri Pacific Railroad Company v. Ault, 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593. The plaintiff sought to impose upon the Director General of Railroads a penalty statute of Arkansas providing that if an employe is discharged he must be paid wages in full within seven days or as a penalty the wages of such employe shall continue at the same rate until paid. The United States had not only consented that the Director General might be sued but also had consented *that he should be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law*. Nevertheless it was held that the penalty could not be imposed. On page 563 the court said:

* * * But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; *but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employes.*

On page 564 the court said:

The purpose for which the Government permitted itself to be sued was compensation, not punishment.
* * * *But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. (Italics supplied.)*

Accord: *Norfolk-Southern Railroad Company v. Owens*, 256 U. S. 565, 65 L. Ed. 1093, 41 S. Ct. 597.

The principle of the *Ault* case has been recently recognized and applied.

Corrigan v. United States, 298 Fed. 610 (D. C.S.D.N.Y.)

In *McCrea v. United States*, 3 Fed. Supp. 184 (D. C. S. D. N. Y.) the principle that the United States cannot be subjected to a penalty was overlooked in the trial of the case and a penalty was imposed against the United States. On motion for re-argument the court's attention was called to the decision in *Corrigan v. United States*, 298 Fed. 610, whereupon a rehearing was granted and the imposition of the penalty was denied on the authority of the *Ault* case. This decision was affirmed by the Second Circuit Court of Appeals in *McCrea v. United States*, 70 Fed. (2d) 632. On page 635 the court said:

* * * In the Arkansas statute the pay for delay was called a penalty, while here it is not, but Justice Brandeis made it perfectly clear in his opinion in the *Ault* case that the name given to what does more than compensate and does punish is not decisive and double damages is given as an example of what the government has not consented to pay.

The decisions of the District Court and Circuit Court of Appeals in the *McCrea* case were affirmed by the Supreme Court of the United States, 294 U. S. 23, 79 L. Ed. 735, 55 S. Ct. 291, on other grounds.

The doctrine of the *Ault* case stands unimpaired.

When corporations such as defendant are created by the United States to make loans they are exercising governmental

functions both when making loans and when realizing on the security of loans.

The Federal Land Bank of St. Paul v. Bismarck Lumber Co., et al., No. 76 in the October term, 1941, of the Supreme Court of the United States, decided November 10, 1941, —L. Ed.—, 62 S. Ct. 1. The bank foreclosed a mortgage and acquired real property. It purchased fencing materials to fence the same. North Dakota attempted to collect a sales tax. The act creating the Federal Land Banks expressly made them exempt from taxation except on real estate. North Dakota contended that Congress could not constitutionally immunize the bank's activities from State taxation. The court held that the tax could not be applied. On page 5 the court said:

The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Graves v. New York ex rel. O'Keefe*, *supra*, 477.

The federal land banks are constitutionally created, *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. *As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government engaged in the performance of an important governmental function."* (Italics added.)

The reasoning of the court in this case is equally applicable to the Regional Agricultural Credit Corporation. No contention has been made that the latter was not constitutionally created. *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. Ed. 577, 41 S. Ct. 243, would seem to negative any such contention.

The *Bismarck* case conclusively refutes the suggestion made in the lower court that these governmental corporations are to be treated as private corporations and that there is a trend in the Supreme Court of the United States in that direction. On page 5 the court discusses the case of *Federal Land Bank v. Priddy*, 295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705, which is one of the principal cases which has given rise to such suggestion. The Supreme Court stated that although it did say in the *Priddy* case that the corporations possess some of the characteristics of private business corporations that their character as Federal instrumentalities was specifically affirmed.

In *Graves v. New York*, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, the court in discussing the functions of the Home Owners Loan Corporation on page 596 said:

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468, 82 L. Ed. 607. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, *all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.* (Italics added.)

The above statement from the *Graves* case was made applicable both to the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporations in the companion case to the *Graves* case, *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605, where the

reasoning and principles of the *Graves* case were made applicable to the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation.

The Supreme Court of the United States has recently pointed out that funds of these corporations, such as would be used to pay the penalty imposed in this case, are funds of the United States Government.

Inland Waterways Corporation v. Young, 309 U. S. 517, 84 L. Ed. 901, 60 S. Ct. 646 (1939). This case involved the question of whether national banks could give security for deposits made by three governmental agencies, to wit: Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation and the Secretary of War on behalf of the Panama Canal Zone. The court reasoned that the funds of these corporations and the losses thereof are the same for all practical purposes as those of the United States itself. On page 523 the court said:

So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of ultra vires. Compare *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8, 48 S. Ct. 12, 14, 72 L. Ed. 131.

On page 524 the court said:

* * * The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County v. United States*, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328; *Emergency Fleet Corp. v. Western Union*, 275 U. S. 415, 48 S. Ct. 198, 72 L. Ed. 345. *The funds of these corporations are, for all*

practical purposes, Government funds; the losses, if losses there be, are the Government's losses. (Italics added).

Also the Supreme Court of the United States has again recently recognized the principle that the United States cannot be subjected to liabilities unless there is Congressional authority therefore. *United States v. Shaw*, 309 U. S. 495, 84 L. Ed. 888, 60 S. Ct. 659. On page 503 the court said:

Jurisdiction in either case does not exist, unless there is specific congressional authority for it.

The defendant corporation is to be regarded in all particulars as an instrumentality of the United States.

Plaintiff admitted as a fundamental, undisputed fact that defendant is a corporation created by the United States, that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States. In paragraph number 15 of plaintiff's brief on defendant's Objections to and Motion to Amend Findings of Fact and Conclusions of Law (R. 323) plaintiff addressed himself to paragraph 15 of defendant's Objections to and Motions to Amend Findings of Fact and Conclusions of Law in which defendant moved the court to amend the Findings of Fact by finding that defendant is a corporation created by the United States, that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States. (R. 316.) With regard to that motion plaintiff says, "The Fifteenth finding is wholly immaterial. No controversy exists with regard thereto. The fact was conceded at the trial and stands out as a fundamental, undisputed issue." (R. 323.)

Regardless of this admission, the court should, perhaps, be advised of the nature of this Government instrumentality.

The Supreme Court of the United States described the Regional Agricultural Credit Corporation in *Keifer & Keifer v. Regional Agricultural Credit Corporation*, 306 U. S. 381, 83 L. Ed. 784, 59 S. Ct. 516. On page 387 the court said:

On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, Act of January 22, 1932, c. 8, 47 Stat. 5, 15 U. S. C. A. Sec. 601, et seq., by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." Emergency Relief and Construction Act of 1932, Sec. 201 (e), c. 520, 47 Stat. 709, 713, 12 U. S. C. A. Sec. 1148. Each corporation was to have a paid-up capital of not less than \$3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional").

The conclusion of the court was that although the Regional Agricultural Credit Corporation was a government instrumentality it was subject to suit not only in contract actions but also in tort actions. On page 392 the court said:

Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 47 Stat. 5, 6, 15 U. S. C. A. Section 604. When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713. Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being.

On page 394 the court said:

The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued." (Italics added.)

The Supreme Court of the United States has recognized the Regional Agricultural Credit Corporations as Federal Agencies. *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605. On page 512 the court said:

* * * In his return of income taxes to the State for 1935 under this law, respondent claimed "as deduction" and "as exempt" salaries paid him as attorney for ~~the~~ Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, *both Federal agencies*. (Italics added.)

Statutes and executive orders of the United States Government demonstrate that defendant is part of the United States Government.

Section 201 (e) of the Emergency Relief and Construction Act of 1932, Sec. 1148 of Title 12, U. S. C. A. authorized the creation of the Regional Agricultural Credit Corporations and is set forth in Appendix A.

The management of the Regional Agricultural Credit Corporations was placed under the Farm Credit Administration by Executive Order of the President of the United States No. 6084 dated March 27, 1933, which Executive Order will be found on pages 793 and 794 of Title 12 U. S. C. A. The paragraph transferring the functions of the Reconstruction Finance Corporation in managing the Regional Agricultural Credit Corporation to the Farm Credit Administration will be found in Section (5) sub-section (e) of said Executive Order and is set forth in Appendix B.

The capital and assets of the Regional Agricultural Credit Corporations have been at all times owned by the United States. Section 1148a U. S. C. A. Title 12 provides that the capital of any Regional Agricultural Credit Corporation can be reduced and the funds made available by any such reduc-

tion should constitute a revolving fund available for the purpose of increasing the capital of any other Regional Agricultural Credit Corporation.

As recently as August 19, 1937, Congress enacted Sections 1148b, 1148c and 1148d of Title 12, U. S. C. A., to be found in the Pocket Supplement thereof on pages 192 and 193. These statutes are set forth in Appendix C and conclusively demonstrate that the Regional Agricultural Credit Corporations are part of the Farm Credit Administration and instrumentalities of the United States.

Reference to Section 1138d Title 12 U. S. C. A., to be found on pages 924 to 926, will show statutes of the United States creating criminal offenses for false representations, over-valuation of property, forgery, counterfeiting, alteration of obligations, embezzlement, misapplication, false entries, concealment, conversion of property, conspiracy, all in relation to the Farm Credit Administration including Regional Agricultural Credit Corporations.

The intimate connection of the Regional Agricultural Credit Corporations to the sovereign government of the United States is also shown by Section 611a, Title 15, U. S. C. A. which provided that the Secretary of the Treasury was authorized to cancel notes of the Reconstruction Finance Corporation in exchange for the delivery up of stock of the Regional Agricultural Credit Corporations held by the Reconstruction Finance Corporation. Such stock was to be delivered to such person as might be designated by the President of the United States. Pursuant thereto the President of the United States designated the Secretary of the Treasury in Executive Order No. 7848 on March 22, 1938, which was published in the Federal Register for 1938, Volume 3, page 632, issue of March 25, 1938, and is set forth in Appendix D.

It is submitted that consideration of these statutes, Executive Orders and the case of *Keifer & Keifer v. Regional Agricultural Credit Corporation* demonstrates that the defendant is part of the sovereign government of the United States.

An analogy supporting the defendant's position is that municipal corporations are not subject to statutory penalties or punitive damages.

The policy behind the principle is that punishment by fines, penalties and the imposition of punitive damages is to cause private persons and corporations to obey the law and that they are inapplicable against the sovereign and its instrumentalities.

Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299,

Bennett v. City of Marion, 102 Iowa 425, 63 Am. State Rep. 454, 71 N. W. 360,

Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526,

McGray v. The City of Lafayette, 12 Robinson 674, 43 Am. Dec. 239 (La.),

City of Chicago v. Langlass, 52 Ill. 256, 4 Am. Rep. 603,

19 *Ruling Case Law*, subject Municipal Corporations page 1141, Section 417.

The same principle has been applied as to the Home Owners Loan Corporation because it is an instrumentality of the United States Government.

Adams v. Home Owners Loan Corporation, 107 Fed. (2d) 139 (8th C. C. A.). On page 141 the court said:

* * * Whether or not the officers and employees of the Home Owners' Loan Corporation entertained malice towards the plaintiff, or whether they acted in bad faith and without probable cause in forwarding information against him, the fact remains that the Corporation is an agency of the government charged by the Act and the Regulation made pursuant to the Act with an official duty to forward information concerning violations of law affecting the Corporation. Its motives in so doing can not be made the basis of an action against it by an individual in a malicious prosecution suit.

It is respectfully submitted that the judgment of the District Court should be set aside and that judgment should be entered in favor of the appellant.

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APPENDIX A

U. S. C. A. Title 12, Section 1148 (Emergency Relief and Construction Act 1932, Sec. 201 (e)) :

The Reconstruction Finance Corporation is authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than \$3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 602 of Title 15. *Such corporations shall be managed by officers and agents to be appointed by the Farm Credit Administration under such rules and regulations as it may prescribe.* Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Farm Credit Administration, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. (Italics added.)

APPENDIX B

Executive Order No. 6084, U. S. C. A. Title 12, pages 793 and 794 Section (5) sub-section (e) :

(5) There are transferred to the jurisdiction and control of the Farm Credit Administration:

(e) The functions of the Reconstruction Finance Corporation and its Board of Directors relating to the

appointment of officers and agents to manage regional agricultural credit corporations formed under Section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

APPENDIX C

Sections 1148b, 1148c and 1148d of Title 12, U. S. C. A.:

Sec. 1148b. Additional powers of regional agricultural credit corporations. Each regional agricultural credit corporation, created under the authority of section 1148 of this title, in addition to the powers granted prior to August 19, 1937, shall have and, upon order or approval of the Farm Credit Administration, shall exercise the following rights, powers, and authority:

Places of transacting business

(a) To conduct, transact, and operate its business in any State in the continental United States, in the District of Columbia, and in Puerto Rico.

Borrow money

(b) To borrow money (other than by way of discount) from any other regional agricultural credit corporation, the Reconstruction Finance Corporation, or any Federal intermediate credit bank, and to give security therefor.

Loans

(c) To lend any of its available funds to any other regional agricultural credit corporation at such rates of interest and upon such terms and conditions as may be approved by the Farm Credit Administration.

Sale to or purchase from other like corporations

(d) To sell to or purchase from any other regional agricultural credit corporation or any corpora-

tion formed by consolidation or merger as provided in section 1148c of this title, any part of or all the assets of any such corporation, upon such terms and conditions as may be approved by the Farm Credit Administration, including the assumption of the liabilities of any such corporation, in whole or in part. (Aug. 19, 1937, c. 704, Sec. 32, 50 Stat. 716.)

Sec. 1148c. Consolidation or merger—Power of Farm Credit Administration.

(a) The Farm Credit Administration shall have the power and authority to order and effect the consolidation or merger of two or more regional agricultural credit corporations, on such terms and conditions as it shall direct.

(b) The Farm Credit Administration is authorized to grant charters to, prescribe bylaws for, and fix the capital of, regional agricultural credit corporations which may be formed by the consolidation of two or more regional agricultural credit corporations, and to approve or prescribe such amendments to the charter and bylaws of any regional agricultural credit corporation as it may from time to time deem necessary. Corporations formed by the consolidation of two or more regional agricultural credit corporations, as herein provided, shall have all the rights, powers, authority, and exemptions; shall be subject to the same supervision and control; and shall have their expenses paid in the same manner as provided by law in respect to regional agricultural credit corporations organized under section 1148 of this title. (Aug. 19, 1937, c. 704, Sec. 33, 50 Stat. 717.)

Sec. 1148d. Rights and powers unaffected by sections 1148b and 1148c.

Nothing contained in sections 1148b and 1148c of this title shall be construed as limiting the rights, powers, and authority granted prior to August 19, 1937, to the regional agricultural credit corporations, the Farm Credit Administration, or the Governor thereof

by any Acts of Congress or Executive Orders. (Aug. 19, 1937, c. 704, Sec. 34, 50 Stat. 717.)

APPENDIX D

Executive Order No. 7848 (Federal Register for 1938 Vol. 3, page 632)

By virtue of and pursuant to the authority vested in me by the Act of February 24, 1938, Public Number 432, 75th Congress, and the Act of March 8, 1938, Public Number 442, 75th Congress, I hereby designate *the Secretary of the Treasury on behalf of the United States* to receive from the Reconstruction Finance Corporation all of such capital stock as the Reconstruction Finance Corporation may hold pursuant to any provision of law referred to in Subsection B of Section 1 of the said Act of February 24, 1938, and to receive from the Secretary of Agriculture and the Governor of the Farm Credit Administration such stock of the Commodity Credit Corporation as they now hold. *The Secretary of the Treasury is hereby authorized and directed to exercise on behalf of the United States any and all right accruing to the holder of such stock.* (Italics added).

(S) FRANKLIN D. ROOSEVELT,
The White House,
March 22, 1938.

United States
Circuit Court of Appeals
For the Ninth Circuit

REGIONAL AGRICULTURAL CREDIT
CORPORATION OF SPOKANE, WASH-
INGTON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator
of the Estate of Simon T. Douglas,
Deceased,

Appellee.

Brief of Appellee

On Appeal from the District Court of the
United States

For the District of Montana,
Great Falls Division

Honorable Charles N. Pray, Judge.

RAYMOND E. DOCKERY,
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FILED

JAN 21 1937

PAUL P. O'BRIEN,
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No. 9956
United States
Circuit Court of Appeals
For the Ninth Circuit

REGIONAL AGRICULTURAL CREDIT
CORPORATION OF SPOKANE, WASH-
INGTON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator
of the Estate of Simon T. Douglas,
Deceased,

Appellee.

On Appeal from the District Court of the
United States
For the District of Montana

Brief of Appellee

OPINION BELOW

The opinion of the District Court (R. 290-301) is reported in 38 F. Supp. 604. This is an appeal from a judgment entered March 5, 1941, (R. 308-309).

JURISDICTION

The jurisdiction of the District Court was exercised pursuant to Sec. 42, Title 28 U.S.C.A.

Chap. 229, Sec. 12, Act of February 13, 1925, 43 Stat. at Large 941, which establishes jurisdiction in actions against a corporation incorporated by or under an act of Congress. A notice of appeal was filed in said cause September 17, 1941 (R. 328).

STATEMENT OF THE CASE

The ultimate questions to be decided can best be viewed from appellee's standpoint by a brief restatement of the case.

The action was instituted in the District Court of the Tenth District of Montana for the recovery of the damage occasioned the Estate of Simon Douglas by a summary foreclosure of a chattel mortgage in violation of a section of the Montana Code, 10140, prescribing damages in double the value of the property alienated, where alienation took place after death and before the appointment of an administrator. (R. 3 to 13.)

On petition, the cause was removed to the Federal District Court. (R. 27.)

The complaint was then amended (R. 73-75). The amended complaint was a simplification of the original and claimed property of the value of \$31,500.20 had been alienated by appellant in violation of said Sec. 10140. Plaintiff asked damages for double that sum (R. 75). Appellant then filed an answer and cross-complaint setting up: (R. 78)

(a) That defendant (appellant) was a government owned corporation;

(b) That Douglas, then deceased, had executed a chattel mortgage December 27, 1933, to

defendant securing a note for \$17,000.00. (R. 80);

(c) That the note, not being paid at maturity, and Douglas having died January 12, 1935, after having executed a renewal mortgage, which appellant had filed of record;

(d) That no person was appointed administrator until April 9, 1935;

(e) That on January 12, 1935, Douglas was indebted to plaintiff in the sum of \$16,328.48;

(f) That for the purpose of protecting its security "as well as the interests of said Estate of Simon Douglas," and pursuant to a power of sale contained in the chattel mortgage, appellant noticed a sale of the property for February 5, 1935;

(g) The property was sold and the net proceeds, \$14,694.28, was applied on the debt, leaving a balance of \$1,694.64, for which a claim has been presented to the administrator of Douglas' estate. (R. 78-90.)

To the answer an amended reply was filed: (R. 99 to 115)

Succinctly the issues made by the pleadings are:

(a) Did the fact that appellant's mortgage contained a power of sale alter its liability to respond in damages as provided by Sec. 10140 R. C. Mont. 1935?

(b) The value of the property sold.

An issue not made by the pleadings is now debated by appellant, viz: If appellant must pay damages, can it be held to pay double damages?

At the trial, which followed, evidence was in-

troduced that the value of the property amounted to from \$18,500.00 to \$22,000.00. Comment on these amounts will be made at appropriate places in this brief.

CONDITION OF THE RECORD

There are many inaccuracies in appellant's statement of facts throughout its brief but we shall only mention a few of them at this juncture.

The court will find the record herein a most peculiar one. In appellant's designation of portions of the record to be included, we find the requirement that certain superseded pleadings and trial briefs be included. (R. 58, R. 67, R. 320, R. 3, R. 31, R. 36.)

The inclusion of these was objected to. (R. 339.)

Their inclusion in the record could not be prevented.

No comment thereon is to be found in appellant's brief. Perhaps they were included so as to give color to the claim that the court changed its mind as to the law of the case after sustaining a demurrer to the original complaint (R. 35), and before the case was tried. To what end or purpose such claim is made appellee is at a loss to know. Possibly that is the reason for the inclusion of superseded pleadings. (R. 3).

18 Stan. Encyc. Proc. 808,
states the general rule as follows:

"The doctrine of the law of the case, in its strict sense, does not apply to decisions or rulings of the trial court. It has the power

to change its prior rulings in the same case at any time during the progress of the cause, and as a general rule should do so as a matter of discretion, whenever it becomes convinced that an erroneous ruling has been made.”

Post v. Pearson
106 U. S. 418
27 L. Ed. 774.

The statement in black type that “The District Court originally held that the Montana Penalty Statute was not applicable to this case,” and the statements immediately following have no foundation in the record. (Appellant’s Brief pp. 4-5.) We know of no such holding or comment, nor any such characterization of the statute by the Court.

QUESTIONS FOR DETERMINATION

The questions for determination by this court are as follows:

(1) Did the power of sale survive the death of the mortgagor? If so, was not the right to exercise the power of sale suspended?

(2) The Montana multiple damage statute does apply regardless of fraud, bad motive or wrongful intention; all of which however were present.

(3) The court proceeded correctly and in accordance with the authorities, doubling the value of the property as determined by the court, and deducting therefrom, the indebtedness represented by the note and chattel mortgage.

(4) The next point raised by appellant's brief is that the Montana statute does not apply to the corporation defendant, the appellant here. The question of sovereign immunity is not presented in this case.

We shall take up the argument of the case in the order in which it is presented in appellant's brief.

ARGUMENT

I.

IT IS WHOLLY IMMATERIAL WHETHER THE POWER OF SALE IN THE CHATTEL MORTGAGE WAS COUPLED WITH AN INTEREST OR SURVIVED THE DEATH OF SIMON DOUGLAS. IF IT DID SURVIVE DOUGLAS' DEATH ITS EXERCISE WAS SUSPENDED BY THE PROVISIONS OF SECTION 10140 R. C. 1935.

At the outset of the argument of appellant it is urged that *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621, is of controlling force. That *Muth v. Goddard* has no bearing whatsoever in this case can be easily demonstrated.

DOES A POWER OF SALE CONTAINED IN A CHATTEL MORTGAGE SURVIVE THE DEATH OF THE MORTGAGOR?

The great weight of authority, and substantially all authority holds that a power of sale, where title has not been vested by an instrument or trust, does not survive death.

Gardner v. Billings First National Bank, 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45; *Hunt*

v. Rousmanier's Admr. 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Parke v. Frank, 75 Cal. 364, 17 Pac. 424; Prink v. Roe, 6 Cal. Unrep. Cas. 491, 7 Pac. 481, 70 Cal. 296, 11 Pac. 820; Travers v. Crane, 15 Cal. 12; Turman v. Winecoff, 138 Ga. 728, 75 S. E. 1131; Terwilliger v. Ontario etc. R. Co., 149 N. Y. 86, 43 N. E. 432; Farmers L. & T. Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784, 37 Am. St. Rep. 696; Hoffman v. Union Dime Savings Institute, 109 App. Div. 24, 95 N. Y. S. 1045; Fisher v. Southern L. & T. Co., 138 N. Car. 90, 50 S. E. 392; 2 C. J. S. 1176.

We will presently analyze those cases indicating that such power is not revoked by death; but we must reiterate at this point that such rule is over-shadowed by Section 10140, R. C. 1935, which suspends its exercise. **The right to exercise the power of sale was by the cited statute suspended during the period intermediate the death of Douglas and the appointment of an administrator.** In the larger sense, it will serve no purpose to investigate the true rule with respect to **the survival** of such a power of sale when found in a chattel mortgage. For instance the rule laid down in

Muth v. Goddard, 28 Mont. 237,
72 Pac. 621

has no application here. There it appears that there was a power granted in a **trust deed which had passed the legal title to the trustee**, which takes the case out of the general rule supra. It will be noted, however, that the power in the Muth case was not exercised intermediate the death and appointment of a legal rep-

representative of the estate. Since the facts involved **no personal property**, the foreclosure was in no sense prohibited by the statute. There was no attempt in the chattel mortgage in question (R. 163-172), to pass the legal title to the property. The power of sale contained in the chattel mortgage in the case at bar was distinctly different than in the Muth case. Whether or not the Montana Supreme Court held that, in a case of that character, involving real estate, the power of sale survived the death of the mortgagor is academic and of no consequence. It did not then and never has so held in the case of a chattel mortgage.

The ejectment case of

First National Bank v. Bell,
S. & Om. Co.,
8 Mont. 32, 19 Pac. 403,

did not involve the death of the mortgagor. The only question considered by the Court was whether a power of sale could be validly exercised or whether, regardless of its being contained in a mortgage, a suit in equity for foreclosure **was not the only method whereby a mortgage could be legally foreclosed.**

We think this analysis of the Montana cases will obviate any further answer to the invocation of the disputed rule of survival of the power of sale. Here, however, we have a statute which so far as called into play in this case, forbids the **alienation of personal property only**. Whatever rules may obtain as to real estate, personal property stands on a distinct footing. Real estate cannot be made away with.

It will stand in somebody's name on the record. The record will also have to carry evidence showing how the person in whose name it stands came into claimed ownership. Real estate cannot be embezzled or stolen. Personal property cannot readily be followed, is capable of concealment, loss and dissipation, and so the statute makes no prohibition against dealings with real property and is expressly aimed at alienations of personality so far as the facts here are concerned.

The Court in the Muth case limits the rules to cases where **legal title is vested**. It does also say "The law may suspend its own process."

There is in Montana a code provision that a mortgage is a mere lien upon the property. (Sec. 8246 R. C. Mont. 1935.) Trust deeds rest on a different footing. There title passes. A power of sale in conjunction with a mere lien does not survive death.

The Montana statute has left open, to be controlled by general provisions, such as 7975 R. C. Mont. 1935, the question of when a power survives death, for a power of sale is merely authorized by statute. Of course, it cannot survive death where as here the language of the instrument is **not** "do hereby sell and transfer" or some similar expression, instead of "the mortgagor mortgages to the mortgagee," as in the instrument in question (R. 163). We can now clearly see the distinction between Muth v. Goddard, involving a trust deed, and the case at bar.

The learned Judge below, familiar with Montana law, was not misled by Muth v. Goddard

and held that even though the power did survive death, it was suspended until the appointment of an administrator. Learned counsel seem to have gotten themselves into a frame of mind where they feel justified in contending that the Montana Legislature expressly passed Sec. 10140, to interfere with the security in this particular case, **not of the United States as intimated**, but of a government owned corporation in fact. This statute has been on the books since 1877. It is first found as Sec. 129, p. 270, Laws 1877; Sec. 192-2nd Div. Stat. 1879-1887; Sec. 2570 Codes Civ. Proc. 1895; Sec. 7504, Rev. Codes 1907; Sec. 10170 Rev. Codes 1921.

When the Chattel mortgage was executed on the 27th day of December 1933 (R. 163) the law had been on the Montana statute books 56 years.

The law is part of every contract.

Snider v. Yarbrough,
43 Mont. 203,
115 Pac. 411.

This is not the first instance in the books when, if the power of sale did survive the death, it was **suspended** by death.

Loss. v. Sternberg, 50 Mo. 124;
Wiener v. Zweib, 105 Tex. 262;
141 S. W. 771, 147 S. W. 867.

It is almost amusing to find learned counsel insisting in effect that the "tail should wag the dog" by making the unwarranted contention that the court **"should have held that the voluntary act of the mortgagor in granting the power of sale suspended the penalty statute!"**

We pass without further comment at this time, the provisions of Sec. 8257 R. C. Mont. 1935, and its application by

Kinsman v. Stanhope,
50 Mont. 41,
144 Pac. 1083,

to Chattel mortgages; cited by counsel pp. 17 and 18 of their brief.

Likewise we postpone an argument with regard to the doctrine of

U. S. v. Summerlin, 310 U. S. 414,
84 L.Ed. 1283; and Davis, Director
General v. Corona Coal Co., 265 U. S.
219, 68 L.Ed. 987,

which cases fall into a differentiated class discussed in Div. V hereof. We only, at this juncture, express surprise at the failure of learned counsel for appellant to distinguish between immunity of sovereign authority and that of general liability of government owned corporations. We shall go into that subject when we discuss the distinction between acts of the government itself and acts of corporations set up by the government, which do not exercise sovereignty, all as appears in the above and related cases.

II.

SECTION 10140 R. C. MONT. 1935 IS NOT A PENAL STATUTE

ARGUMENT

The parent statute, adopted by Montana and Oklahoma from California, as will be hereafter discussed, with the construction thereof al-

ready established by the California Court in
Jahns v. Nolting,
29 Cal. 507,
is conclusive on the subject. From that case we
quote as follows:

“A penal statute is one that imposes a penalty, or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong, that concerns the good of the public, and is commanded or prohibited by law. The law, generally, first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. (Reed v. Northfield, 13 Pick. 94; the Suffolk Bank v. the Worcester Bank, 5 Pick. 106; Frohock v. Pattee, 38 Maine 103; Bayard v. Smith, 17 Wend. 88; Sedg. Stat. and Const. Law, 390.)

“In this case, the public are not more interested than they are in every action for a tort prosecuted for the benefit of a private party, nor do the damages authorized by the statute partake of the nature of the punishment for an offense, in a greater degree than in every case where by the common law or the statute a recovery beyond the actual injury sustained is permitted.”

This is the universal rule.

Dunbar v. Jones,
87 A. 787
87 Conn. 253.

Dubreuil v. Waterman,
78 A. 721,
84 Conn. 47.

WHAT IS THE MEANING OF THE WORD “ALIENATE” FOUND IN OUR STATUTE?

The word “alienate,” itself, as contained in the statute is directed at every person. No thief or interloper meddling with the property would fall under the classification connoted by the word “alienate.” In

2 C. J. 1934,

the various definitions of the word “alienate” are set forth as follows:

“To convey or transfer to another; to convey or transfer to another the title to property; to transfer the property ownership of anything, to make over to another owner; to pass property from one person to another; to transfer property from one’s self to another; to transfer property to another; to make a thing another man’s; to divest one’s self of property or title, at common law to voluntarily part with the ownership of property either by bargain and sale, or by some conveyance or by gift or will.”

See also 3 C. J. S. 515.

In Bancroft’s Probate Practice, Vol. 2, p. 891, it is said:

“Under code sections authorizing double damages where one, prior to appointment of

a representative, "alienates" or "embezzles" property of the decedent, to "embezzle" is to appropriate fraudulently to one's own use, or to conceal the effects of the estate which such person has in his possession; and to "alienate" signifies wrongfully to transfer the property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. The statute does not give a new right of action, nor does it create a remedy which did not previously exist; it merely increases the measure of damages in case the tortious conversion has been committed at a particular time when the property was peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuing of letters of administration. * * * The double-damage statutes have been held applicable to one who forecloses a chattel mortgage between the time of death of the decedent and the appointment of a representative. They do not, however, prevent such mortgagee from replevying the property prior to issuance of letters. And if a chattel mortgagee, before the appointment of an administrator or executor, merely takes possession of the mortgaged property, without selling it, he is not liable for double damages under the "embezzlement" or "alienation" statute, and it is immaterial that he may have unsuccessfully offered to sell the property during such time."

It was intended by the code provision in question to differentiate between **crime** and **acts which did not constitute crime**. It was directed against everyone then having some character of title, **those acting under power of sale and all others**. It excepts no one whose act amounts to "alienation" within the legal definition of that word. It does not except persons acting in good faith or alleged good faith. It makes the bald declaration that **anyone** so interfering with the rights of creditors and the rights of heirs **shall pay double the value of the property so alienated**.

Here, however, there can be no doubt that the damage was incurred to the tune of the value of the property alienated in the sum of \$17,000.00, if only the single value be considered. The statute invoked, declares this must be doubled.

Under the statute, the liability for double the damage exists, regardless of what the property may have been sold for by the one alienating it. **Admittedly here, the appellant alienated the property for a total of \$15,002.10**. Defendant has committed itself to this value at least. The damage, in this case, depending upon the lower Court's appraisal of the evidence, as to true values, and which the Court fixed in accordance with the statute, or \$34,000.00, would have to lie somewhere between \$30,004.20, double the value claimed by defendant, and \$44,000.00, double the value as fixed by some of appellee's evidence, and from that there is no escape under the authorities. In Oklahoma the

same identical statute exists as here. It appears as

Section 1220, Com. Stat. of Okla. for
the year 1921, or 1603 Wilson's Rev.
& Ann. St. Okla. 1903,

reading word for word with the Montana statute, as quoted in the following case of

Litz Exchange Bank of Alva, Okla,
15 Okla 564,
83 Pac. 790,

wherein the Court said:

"The question presented to this Court is whether or not the holder of a chattel mortgage, **who in good faith deems himself insecure**, after the death of the mortgagor, **who dies intestate, before the debt is due**, and prior to the appointment of an Administrator, either special or general, can take **possession of and sell the property covered** by said mortgage.

This action is based upon Section 1603, Wilson's Rev. & Ann. St. Okla. 1903, which provides as follows:

"If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. * * * **Hence the right to the possession of personal property between the time of the death of the intestate and the**

granting of letters of administration is by operation of law suspended and held in abeyance. In 11 Am. & Eng. Encyc. of law, (2d Ed.) p. 985, the rule is thus stated: 'The title of an administrator, on the other hand, is derived solely from the Court by which his letters are granted, and therefore his title to the decedent's estate does not vest until the letters are granted.' And on the following page, in a note, this doctrine is announced: 'Between the death of the intestate and the granting of letters, the legal title to personal property of the intestate is suspended and vested in no one.' See authorities there cited.

In the case at bar the mortgagee proceeded to take possession of the property covered by the chattel mortgage the day following the death of the mortgagor, who died intestate on the 14th day of May, 1895, and on the 17th day of May the mortgagee proceeded to advertise the property for sale, and sold the property on the 28th day of May, 1895, before a special or general administrator had been appointed, and before any application for appointment had been made. But, since the property of a decedent passed the moment of his death to the heirs, subject to the control of the Probate Court, the right of the mortgagee to foreclose and sell the property was suspended and held in abeyance until a special or general administrator was appointed by the Probate Court and any attempt to sell or alienate the property during that period was a wrongful intermeddling with the property of the intestate * * * *

A mortgagee, if he has reasonable grounds to apprehend, and in good faith believes, that the security is about to be lost or materially impaired, has a right to take possession of the property for the purpose of preserving it, but has no right to sell or alienate the same until a special or general administrator has been appointed, whose duty it is to protect the interests and rights of the estate. We think the manifest purpose of the act of the Legislature, which provides that if any person, before the granting of letters testamentary or of administration, alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so alienated, was to prohibit the doing of just such acts as are alleged to have been committed in this action. In other words, from the agreed statement of facts in this case, we think the defendant comes clearly within the letter and spirit of said act." (Emphasis ours.)

and in

Altman Taylor Mach. Co. v. Fuss,
86 Okla. 168,
207 Pac. 308;

and in

Secrest v. Wood,
98 Okla. 60,
224 Pac. 549,

the statute is construed and the holdings are directly in point here.

The Oklahoma decisions are particularly called to the attention of the Court, because Oklahoma, like Montana, **adopted her statute from California**, and after the California Court had construed it. Moreover, both the California and Oklahoma decisions constitute the only rational interpretation of the statute.

As early as 1866, California had incorporated this provision into her statute law, for it is found as Section 116, and we quote it because the California statute was amended not in meaning, but in phrasing, in the year 1901, and the original enactment as it existed at the time of *Jahns v. Nolting*, and as adopted by Montana and Oklahoma, reads as follows:

“If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall be liable to the action of the executor or administrator for double the value of the property so embezzled or alienated.”

The lower Court, of course, took judicial notice of the fact that the Montana Code containing this provision was adopted in 1895 from California. That is the source of Montana Code Law. When Section 10140 was adopted from California, **it had received construction by the California Court.**

In

Jahns v. Nolting

29 Cal. 508,

the Court said:

“To embezzle, as the term is employed in Section one hundred and sixteen, is to fraudulently appropriate to one’s own use or conceal the effects of the estate which such person has in his possession; **and to alienate, signifies to wrongfully transfer such property to another.** Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. **An action of the nature of an action of trover may be brought by the administrator, without the aid of section one hundred and sixteen,** against any person who has embezzled or **alienated** the personal property of the estate, **prior to the grant of administration; * * ***” (Emphasis ours.)

Quoting this from the California Court, the Oklahoma Court, in the Altman case, says:

“The above case has been followed and cited by Courts of different States in several opinions, and correctly defines the term, alienation, and we know of no case holding to the contrary.” (Emphasis ours.)

This Court is familiar with the rule that a construed statute adopted from another state carries the previous construction thereof by the Court from whence adopted. In the State Courts, this rule of presumption is strongly persuasive. **In the Federal Courts in the absence of a different construction by the State adopting the statute, the rule is clearly recognized; and always applied.**

American Surety Company of New York
v. Cove Irr. Company,
54 Fed. (2d), 197.

One of the latest expressions of the Montana
Court on this subject is

Coburn v. Coburn,
89 Mont. 386,
298 Pac. 349,

and the Court says:

“In applying this statute this Court has
held, and we think correctly, that our statute
was adopted from the State of California,
and that with it we adopted the construction
given it by that State.”

This rule has been expressed on numerous
occasions by the Montana Court, the latest of
which, so far as our research goes, is

H. Earl Clack Co. v. Stanton,
105 Mont. 375,
72 P. 2d, 1022.

It likewise is the recognized rule of the
United States Supreme Court:

U. S. v. Anderson,
52 S. C. 125,
284 U. S. 584,
76 L.Ed. 505.

The case of

Jahns v. Nolting,
29 Cal. 507,

is the key case for this reason: It does decide

definitely that the defense to a criminal act, viz: Good faith and want of criminal intent applies only to a charge of **embezzlement, and not to a charge of tortious alienation.**

In discussing the rule here invoked,

Bancroft's Probate Practice,
Vol. II, Sec. 484, page 890,

says:

"There is some justification for a statute making one who embezzles or alienates property of a decedent before the grant of administration upon the latter's estate 'liable' to an action for double the value of property. Before administration is had, there is grave danger that an estate may be scattered and dissipated beyond trace by the designing efforts of persons who quietly appropriate goods and effects in the hope that their preying upon the dead will not be discovered. An inhibitory penalty to discourage such practices thus finds some warrant."

The modern cases giving construction to this act are confined to Oregon, Wyoming, Wisconsin and Oklahoma. As we have seen, Oklahoma, having adopted the same statute from California with its construction, as did Montana, is clearly correct, both on principle and by virtue of binding precedent.

The Oregon case of

Springer v. Jenkins,
47 Ore. 502,
84 Pac. 479,

relied upon by appellant, was reversed because

of an excessive award, partly **because the Plaintiff did not plead the statute**, giving double damages as was done here, and without pleading the statute it could not recover multiple damages, (See par. III of the Amended Complaint, R. 74), and which pleading is necessary **where one seeks to recover multiple damages.**

The Springer case is remarkable in illustration of judicial legislation. Moreover, all that is said on the subject of good faith is obiter dicta. It has been materially weakened, however, by the Oregon Court, particularly in

Swank v. Elwert, 55 Ore. 487,
105 Pac. 901.

Springer v. Jenkins has already been repudiated with respect to some of its holdings as we have seen, and it can safely be predicted that it will be entirely repudiated when the court comes to reconsider the point of the status of double damages.

The Oregon court in another case, Gabel v. Armstrong, 88 Ore. 84, 171 Pac. 190, speaking of Springer v. Jenkins, 47 Ore. 502, 84 Pac. 479, said:

“The authority of these cases is greatly impaired by the latter decision of Swank v. Elwert, 55 Or. 487, 502, 503; 105 Pac. 901, which overruled Springer v. Jenkins.”

In the teeth of Oregon's doubt as to the soundness of the Springer case, should we consider it as having any weight?

The Wyoming Court, in Delfelder v. Poston, 42 Wyo. 176, 293 Pac. 354, 361, held that the property was not “alienated,” when purchased

by the mortgagee. This case is to be distinguished from the case at bar and the Oklahoma cases except the case of *Nichols-Shepard v. Dunnington*, 118 Okla. 213, 247 Pac. 353, in that the property **was then purchased by the mortgagee, and on negotiations approved by the mortgagor before his death**, and for a price commensurate with the value of the property, which was not an alienation.

Merill v. Comstock, 154 Wis. 434, 143 N. W. 313, disappears as an authority in support of appellant's position, when we consider that the Wisconsin statute (Sec. 3824), reading like that of Montana, **was qualified by a companion statute (3259 Wisc. Stats.)**, the decision, quoting that statute, reading:

“No person shall be liable to an action as executor of his own wrong for having received, taken or interfered with the property of a deceased person; but shall be responsible as a wrongdoer in a proper action to the executors or general or special administrator of such deceased person **for the value of any property or effects so received or taken** and for all damages caused by his acts to the estate of the deceased. This section came in as part of a scheme for the distribution by the administrator of the assets of the estate pro rata among all the creditors of the decedent of equal rank where such assets were insufficient to pay in full. It was therefore necessary to make some change with reference to the law relating to executors de son tort. That particular form of action was abolished, and the person who took or inter-

ferred with the property of the deceased person was made responsible as a wrongdoer, not to the creditors or legatees, but to the executors or general or special administrators of the deceased person.” (Emphasis ours.)

The cause turned on this latter statute. So the authority of the Wisconsin case as supporting appellant disappears. On the other hand, since it was necessary to apply the applicable statutes above quoted, in order to work out the ruling of non-liability for double damages, one wonders if the court would not have performed exactly the view of the Oklahoma, California and other courts if considering only the statute here in question.

Bachelder v. Tenney, 27 Vt. 578, has not the remotest bearing upon the case at bar. In no sense does it support the Springer case nor Defelder v. Poston, 42 Wyo. 176, 293 Pac. 354.

That case was brought for multiple damages for alleged embezzlement of property of the estate. The defense was that of ownership through joint tenancy with decedent.

The court said:

“There was no secrecy in taking the property, and no concealment of it by the defendant, and no claim made to it, **but as a tenant in common.** * * * All, which the defendant did was done under a claim of right, and the evidence in fact shows that his claim of right, **as tenant in common**, was well founded, and as such, he did not deny his liability to account to the estate of Cilley.” (Emphasis ours.)

See 62 C. J. 408, Sec. 2.

In *Roys v. Roys*, 13 Vt. 543, the construction of the statute apparently turned upon a clause not found in the Montana, California or Oklahoma statutes. At any rate, apparently the court considered the statute had but a single purpose and that was to do away with the right of creditors to sue, and that it merely extended the common law right of an administrator to sue to the extent of giving double damages. That the common law right still existed, and there was retained the defense that if the person who alienated did so under color of right, supposing he had good title, he had a defense.

In *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857, we find a set of facts involving embezzlement. The last sentence of the opinion declares that. If the case at bar involved **embezzlement**, we would agree the case is an authority here. If this were an embezzlement case, there would have to be wrongful intent established, and perhaps more.

See 20 C. J. 407, Sec. 1.

It hardly seems necessary to comment upon

McDonald v. Montana Wood Company,
14 Mont. 88,
35 Pac. 668.

The case carries its own differentiation. The Court said:

“The respondents contend that it was not necessary, under said section, to allege or prove malice, wantonness, or evil design, etc. In *Endlich on the Interpretation of Stat-*

utes, (section 129), the author, commenting on similar statutes, says: 'Similarly, statutes giving punitive, double or treble damages against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, **are held confined to cases where some element of willfulness, wantonness, carelessness, or evil design enters into the act.** * * * The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the rendering of judgment for treble damages against defendant in this case.' (Emphasis ours.)

When we consider that the holding of the court was persuaded by failure of proof to meet the allegation of the complaint that the act was done maliciously and wantonly, the case disappears as an authority. Otherwise it would be out of line with the general trend of modern authorities.

See 63 C. J. 1071, Sec. 287.

A complete answer to all arguments as to the rule is found in

Sauls v. Whitman,
171 Okla. 113,
42 Pac. (2d) 275.

The Court said:

"Many of the decisions from other jurisdictions, being based on virtually identical circumstances, result in conclusions which can

neither be harmonized with each other nor distinguished by the fact situations. This is probably caused by lending a keen ear to human sympathy in the individual case, meanwhile closing the other ear to public policy and shutting both eyes to the settled law. Just so long as the rules are attempted to be varied to fit the case, or the facts looked at through differently colored glasses in order to reach the desired result, there will be no dependable rule; no settled fixed principle upon which to proceed." (Emphasis ours.)

Again the Court said:

"The next question for consideration is whether the defendants are doubly liable under Section 1219, O. S. 1931, set forth above. The section deals with embezzlement or alienation in instances of this kind. No embezzlement being charged, this is an action involving alienation. This Court in *Aultman & Taylor Machinery Co. v. Fuss*, 86 Okla. 168, 207 P. 308, 309, and in *Nichols & Shepard Co. v. Dunnington*, 118 Okla. 231, 247 Pac. 353, in defining what is meant by the word 'alienation,' adopted the definition of the Supreme Court of California as expressed in *Jahns v. Nolting*, 29 Cal. 507, as follows: 'To alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law,' which definition of itself thereby signifies that the word 'wrongful' means wrongful on account of its being

in violation of the statute and in violation of the common law, **rather than as signifying a wrongful state of mind. In other words, whether such an alienation is 'wrongful' depends not so much on the state of mind as upon the acts done.**" (Emphasis ours.)

The Court then reviewed Exchange Bank of Alva, 15 Okla. 564, 83 Pac. 790, and said:

"It being admitted that the **mortgagee bank acted in good faith**, the trial court found the issues in favor of the defendant. This court, reversing the judgment, said: **"But this fact would not warrant the mortgagee in advertising and selling the property before a special or general administrator was appointed. * * *** We think the manifest purpose of the act of the Legislature * * * was to prohibit the doing of just such acts as are alleged to have been committed in this action. In other words, from the agreed statement of facts in this case, we think the defendant comes clearly within the letter and spirit of said act." (Emphasis ours.)

A review was then made of Hodgson v. Hetfield, 112 Okla. 134, 240 Pac. 69, saying that where money was turned over on advice of an attorney, it was no excuse, and said:

"Subsequently, the administrator of Pollock's estate recovered double damages against the Sheriff and the verdict was upheld regardless of the good faith of the Defendant."

The Court also in considering alienation

held that because the word “alienate” means to transfer to another, said:

“The mortgagee of personal property of a deceased person foreclosed against it just as in *Litz v. Exchange Bank of Alva*, *supra*, but, instead of selling the property to a third party, **as in the Litz case, bid the property in itself and applied it on the mortgage debt. That is the distinction between the cases.** The Nichols case is not based on absence of wrongful alienation, but on the fact that there was no alienation at all. We do not know what conclusion was reached by the trial court concerning the defendants state of mind; but if affirmance of the judgment should require a finding that it was ‘wrongful,’ the evidence herein including the reasonable inference to be drawn therefrom, would be sufficient to support such finding. It is undisputed that the defendants in taking the actual cash from the bank, keeping it in their homes instead of depositing it in their accounts until after Mrs. Jent’s death, and then disregarding all notice to creditors but summarily paying what creditors of hers they knew of, including the \$195 to a defendant’s wife, and hastening the remainder away to the society, acted with the motive of keeping it out of probate, the very evil against which the statute is aimed. **The statute requires no ‘wrongful’ intention and none is required, other than the intention to do the thing which the law forbids.**”

In Montana and California are optional procedural statutes. (Mont. R. C. 1935, Sec. 10141

& 10142.) In considering those statutes, adopted from California by Montana, we find a late construction of the purpose of the double damage statute in question.

In

Levy v. Superior Court,
105 Cal. 600,
29 L. R. A. 811,
38 Pac. 965,

the court said:

“There is no question that, if petitioner’s premises are correct, his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458-1461 of the Code of Civil Procedure were, prior to the adoption of the Codes, a part of the old probate act, as sections 116-119 they are a part of the same article, and relate to the same subject, which is expressed in the title as ‘Embezzlement and surrender of property of the estate.’ In the case of *Jahns v. Nolting*, 29 Cal. 507, the court had occasion to construe section 116 of the probate act (now section 1458, Code Civ. Proc.) upon the very feature now involved. * * * And it was held that the section was not penal, but purely remedial. Sections 1459, 1460, are strictly within the principles of construction announced in that case. They are no more penal in their essential features than is section 1458. It is true that, as urged by pe-

tioner, they provide for pains and penalties, in the way of imprisonment and damages, under certain contingencies; but the essential distinction between these provisions and a penal statute is that the penalty is not imposed as a punishment for a public wrong, but as redress for a private grievance. And it is not unusual to find provisions of a similar character in statutes purely remedial. Both before and since *Jahns v. Nolting* these sections have several times been under consideration by the court. In *Beckman v. McKay*, 14 Cal. 250, the court considered the action, which was brought under Section 116 of the probate act, as in the nature of an action of trover and conversion; and in *Mesner v. Jenkins*, 61 Cal. 151, it is said 'that under a statute very similar, if not precisely like sections 1458-1461, Code Civ. Proc., the power of a judge of probate, in respect of matters of this kind, is analogous in its extent and object of the power exercised by courts of chancery upon bills of discovery.' "

III.

THE DOCTRINE OF NOSCITUR A SOCIIS DOES NOT APPLY

The use of the word "alienate" in the statute in disjunctive with the word embezzle, only accentuates legislative intent that here should be double damages, regardless of good or bad faith. If one embezzles property, he is civilly liable the same as one who alienates the property. The embezzler gets his greater punishment through the criminal prosecution which

is not in anywise affected by the fact that he is also civilly liable. For the civil liability he stands on the same footing exactly as the one who alienates.

A little thought on this subject would, we submit, have caused learned counsel to omit any reference to

State v. Moran,
24 Mont. 433,
63 Pac. 390,

as an authority having any bearing here. The application of the doctrine there is foreign to any application here.

Here the statute reads "Embezzles or alienates."

The maxim **Noscitur a Sociis** does not apply where a **disjunctive** is used. It applies only where a **conjunctive** is used. Thus in 59 C. J. 979, Sec. 579, the rule is stated:

"In accordance with the maxim, **noscitur a sociis**, which, however, is merely a guide to the legislative intent and not a fixed rule of construction, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. **Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears. The use of the disjunctive militates against the application of the maxim.** The rule of **noscitur a sociis** is not invariable, as a word may have a character of its own, not submerged by association. The maxim cannot be invoked where the language is plain." (Emphasis ours.)

How the conduct of appellant can be said to be inconsistent with the imposition of double damages no one but appellant can see.

The conduct was not consistent with good faith and fair dealing. Douglas had scarcely been laid away when appellant moved in to take possession and sell. That appellant wished to do just what it did is apparent. In the conversation and in the telegrams which passed, appellant wished to carry the impression that if the heir took over she must personally assume the debt.

Max Worthington, the son-in-law of decedent, in a conference in January, 1935 (R. 175), was asked by appellant to assume the indebtedness as a condition precedent to being permitted to take and handle the sheep (R. 184-187). Max Worthington, and not Dorothy Worthington, wired on January 23, 1935: "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations." (R. 180.)

There was ample food on hand to carry the sheep through the winter. The appellant knew, or could have found out from any responsible lawyer that it had the right to take possession of the sheep and care for them until an administrator was appointed. It knew that it could apply for and have an administrator appointed without notice. (Sec. 10107-10108 Mont. R. C. 1935.) It knew that it was unlawful—forbidden by law—to sell ad interim death and appointment of such administrator. It knew that winter months in Montana were not propitious for such sales. It knew that the sheep had in poten-

tial wool on their backs, and lambs, **a ventre sa mere** more in value than the mortgage on them.

At the place of sale, before the sale commenced there appeared an attorney and a banker, who called attention to the fact that the proceeding before the appointment of an administrator was illegal. (R. 218-219.)

The banker served a written protest. (R. 218.)

In Bouvier's Law Dictionary, Vol. 2, 1359, "good faith" is defined as follows:

"An honest intention to abstain from taking any unconscientious advantage of another, even through the forms of technicalities of law, **together with an absence of all information or belief of facts which would render the transaction unconscientious.** Wood v. Conrad, 2 S. D. 334, 50 N. W. 95. See Winters v. Haines, 84 Ill. 588; Rawson v. Fox, 65 Ill. 200; Thornton v. Bledsoe, 46 Ala. 73; Bronner v. Loomis, 17 Hun. (N. Y.) 442. That honesty of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. Canal Bank v. Hudson, 111 U. S. 80, 4 Sup. Ct. 303, 28 L.Ed. 354." (Emphasis ours.)

See also 28 C. J. 715, Sec. 9.

In

Yale Oil Corporation v. Sedlacek,
99 Mont. 411, 43 Pac. (2d) 887,

it is said:

“Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.”

An heir-at-law is not the only person interested in an estate of a decedent. The creditors have also an interest therein. The heir's interest is only in the property which will remain after the payment of the debts and expenses of administration.

Sec. 7073, R. C. Mont. 1935.

The answer of the defendant does not show good faith. While it is true that the authorities upon which appellee relies does not permit such as a valid defense, yet, nevertheless, the defendant alleges nothing of interest in that direction because as a creditor it had the right upon application, to have an administrator appointed, either general or special, and it also had the right to take possession of the property and preserve it pending the appointment of an administrator. It was not necessary, nor is there any showing of necessity of a sale of the property at that particular moment.

Douglas owed at the time, in addition to the amount due Regional, at least \$16,000.00. (R. 243.) These creditors, as well as the heirs, had an interest in the estate. An heir's interest is only in the net of an estate, after creditors have been paid.

There was ample evidence to support the

court's finding that the value of the property was \$17,000.00.

If any quarrel can be made of the court's finding of value, it should come from appellee. The court could have found the value much greater and have been sustained by the evidence.

To start with, appellant offered without restricting the offer, Exhibit "9" (R. 243) a sheet showing the valuation placed by Douglas on the sheep alone, to be \$20,110.00, hay worth \$2650.00, horses worth \$1125.00, alone, amounting to \$23,885.00.

When defendants introduced Exhibit "9," it was introduced without reservation, and is competent evidence of values, character and condition, as well as numbers. If plaintiff had offered the exhibit, it might have been objected to as self-serving; but when defendant offered it, it had the same validity as evidence, as though plaintiff had offered it and it had been received without objection.

In 22 C. J. 231, Sec. 207, it is said:

"Where self-serving declarations are admitted without objection, the evidence cannot afterward be objected to as incompetent."

The estimated wool clip from these sheep was separately valued at \$10,500.00 (R. 244). This would have been clipped in four months. As the court knows, sheep men do in this respect "count chickens before they are hatched," as experience shows they may safely do with reasonably certain limitations. He also separately values the estimated lamb crop at

\$7,000.00. These lambs would have been produced in about two months. The estimated wool and lamb crop were in excess of the amount of the mortgage debt at the time of foreclosure.

What does appellant do with its own witness? Robinson's testimony, (R.239-266). Robinson said (R. 259):

"Q. All right, now you men had passed judgment just a few days before the sale or a short time before the sale, and you, as Mr. Douglas' manager, were familiar with those sheep on the price of \$18,500.00, were you not?

A. Not just the sheep, it was on the entire equipment.

Q. All right, let's put the whole business in at \$18,500.00. Were the horses in there?

A. I don't think so.

Q. The horses, at least, were out of the deal?

A. So far as I remember, they were."

There can be no doubt that W. E. Robinson's testimony, while intended to benefit defendant, throws all its weight in favor of plaintiff. When his attention was directed to his idea of valuation of the animals five years before, at the time of the sale, he was visibly embarrassed. This only illustrates the often commented upon rule in weighing evidence concerning the recollection of a witness. The philosophy of the rule is well set forth in

23 C. J. 27, Sec. 1764,

as follows:

"Other things being equal, memory of an event is clear and strong in proportion to its

recency. Hence, in weighing testimony, allowance is constantly made for actual or presumptive want of recollection of facts occurring at a very remote date, and greater credit may be given to the sworn or unsworn statements of a person when made near to the time of the fact under investigation than to his contrary testimony at a much later time. An impression is remembered the better in proportion as it is more attended to, * * *

It is difficult to understand appellant's discussion of the law of evidence with regard to value. If appellant means that the witnesses must under a statute such as we have here, testify to market value, then of course, we take immediate and vigorous issue.

The statute says there shall be a liability "for double the value of the property." It is silent as to how that shall be measured. It is measured by evidence of market value—it is measured by any evidence of value. It is measured by the evidence that was adduced under whatever heading it might scientifically fall,—by all the evidence adduced in the case. It is conceived that the Legislature did not care to confine one to market value. Market value is rather a fluctuating value. The wrongdoer chooses his own time for the commission of a tort. He might, if the Legislature had confined the measure to market value, choose a time when that value was low.

Value, in law, is sometimes qualified by the word "market." The distinction is pointed out in

66 C. J. 418,

where in discussing the sense in which it is used in our statute, it is said:

“The primary meaning of ‘value’ is worth. In general, ‘value’ has two different meanings; it sometimes expresses the utility of an object and sometimes the power of purchasing other goods with it; the one may be called ‘value in use,’ the other ‘value in exchange.’ In the first sense ‘value’ has been defined as the utility of an object in satisfying, directly or indirectly, the needs or desires of human beings; as applied to property, an attribute which the property possesses by reason of the use which is or may be made of it; of the product that it produces, or may produce; or of some sentimental association connected with it; thus property may have value, notwithstanding there is no market for it.”

In this larger sense, none of the evidence introduced by defendant is relevant to the issue in the case under the statute. Value here should be measured by the standard of plaintiff’s evidence. The plaintiff is not bound by evidence of what at the given moment of tortious taking it may have on the market. That may be a proper measure of damages in those commodities kept exclusively for purchase and sale, as distinguished from commodities kept for production purposes, such as a band of sheep, a herd of cattle, or the like.

The tortious sale broke up this band of sheep and scattered them in many directions. It was impossible to trace through to determine the increment of value at the time of the tort potentially in existence and partially matured;

namely the lamb crop and the wool crop, which would in the course of events and in a very short while have become tangible. It was the value, in its broader sense, intended by the statute. The quantum and quality of evidence introduced by plaintiff is overwhelming in this respect.

It can be said with accuracy that defendant produced no evidence materially affecting the issue. The three points in the evidence avail of this rule, Hall Clement's evidence, the mute evidence of Douglas himself, and Robinson's view at the time just preceding the sale.

Sec. 8689 R. C. Mont. 1935, Value & Market Value;

Klind v. Valley County Bank,
69 Mont. 386, 222 Pac. 439.

IV.

COUNSEL CONTEND THAT IF THE PROPERTY SOLD FOR LESS THAN ITS FULL VALUE, THE DAMAGE IS ONLY THE DIFFERENCE BETWEEN THE SALE PRICE AND VALUE. THIS LOSES SIGHT ENTIRELY OF THE STATUTE. (Sec. 10140.) THIS STATUTE DOES NOT MENTION "DAMAGES." IT SAYS THE ALIENATOR IS LIABLE TO AN ACTION * * * FOR DOUBLE THE VALUE OF THE PROPERTY SO ALIENATED.

With the construction of this statute comes the rule of recovery.

In Jahns v. Nolting, 29 Cal. 507-511, it is said:

“And that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the damages, in case the tortious conversion has been committed at a particular time, * * * that is, the time intermediate the death * * * and the issuing of letters.”

This is not only the law of Montana by adoption of construction with the statute, but it is the law tested by all the decisions.

Sec. 8689 R. C. Mont. 1935, fixes the measure of damage as follows:

“The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The **value** of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest **market value** of the property at any time between the conversion and the verdict, without interest, at the option of the injured party. (Emphasis ours.)

This section contains both expressions: “value” and “Market value.”

The Montana court has often distinguished the two.

Thornton Thomas Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625; Klind v. Valley County Bank, 69 Mont. 386, 222 Pac. 439; In Durocher v. Myers, 84 Mont. 225, 274 Pac. 1062, it is said:

“The measure of damages is ‘the value of

the property at the time of its conversion' (Sec. 8689, R. C. 1921), which usually means the market value, (*James v. Spear*, 69 Mont. 100, 220 Pac. 535); but property may have a value notwithstanding there is no market for it, and it will not do to say that, because not bought and sold in the market, valuable property may be taken or destroyed and the owner receive nothing therefor, (*Union Pacific Ry. Co. v. Williams*, 3 Colo. App. 526, 34 Pac. 731)."

When witnesses testified as to "value" they would be understood as meaning value measured in any way. But the witnesses for appellee were duly qualified in a very formal manner to speak on the subject.

(See witness Yeager, R. 125)

(See witness King, R. 143-147)

Now counsel inject the **de son tort** rule and insist upon its being exemplified by *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313. That case expressed an old common law rule, and we have heretofore fully discussed the case.

Here, however, we need not be in doubt for the established rule is stated in *Aultman & Taylor v. Fuss*, 86 Okla. 168, 207 Pac. 308, as follows:

"It is next contended that the court erred in instructing the jury as to the amount of recovery if the plaintiff should recover. The plaintiff in error contends that the court should have advised the jury the amount of recovery would be the value of the property, less the amount of the lien upon said prop-

erty, and then double that amount, and, if the lien was more than the value of the property, the plaintiff could not recover. The statute is plain and unambiguous, and makes no reference to a lien, and the contention is contrary to the holding in the case of *Litz v. Exchange Bank of Alva*, 15 Okla. 564, 83 Pac. 790. The instruction of the court followed the statute, and was not erroneous."

V.

REGARDLESS OF THE FACT THAT APPELLANT IS A GOVERNMENT OWNED CORPORATION, IT IS LIABLE EXACTLY LIKE ANY OTHER PRIVATE CORPORATION.

Ever since it became common practice to employ government owned corporations, for furthering administration policies, counsel for these government owned corporations have been fighting a losing battle in their endeavor to maintain (1) that such corporations were in fact the United States and were not suable, *Keifer & Keifer v. R. F. C.* 306 U. S. 381, 83 L. Ed. 784; (2) liable for costs, *Reconstruction Finance Corporation v. J. A. Menihan Corp.*, 312 U. S. 81, 85 L. Ed. 595; (3) liable for attorney fees, *Davis v. Perrington*, 281 Fed. 10; (4) liable for damages, *Melon v. World Pub. Co.*, 20 Fed. (2d) 613; (5) liable for special equitable imposition, *R. F. C. v. J. A. Menihan Corp.*, 312 U. S. 81, 85 L. Ed. 595; (6) liable in tort, *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 83 L. Ed. 784. It is not surprising, therefore, that we find gov-

ernment counsel again mustering every resource to defeat multiple damages.

Their difficulty in all these contentions was their failure to differentiate between **sovereignty and sovereign acts** and those of instrumentalities and agencies—government owned corporations, set up by the government.

Of course, it is fundamental that the sovereign cannot be sued without its consent. It may enforce any condition it desires to impose, if it does assent to suit.

65 C. J. 1409, Sec. 184.

With this statement we launch at once into an analysis of *Missouri Pacific Ry. v. Ault*, 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593. That case **involved** the full **sovereignty** of the United States. In conducting World War No. 1, it was found important for the **sovereign, acting not through the agency of any private corporation**, not even through the Railroad corporations themselves, but through direct action of the executives, nominally one of the secretaries, actually by the President himself, to manage and control the railroads. Whether this action could have been taken without congressional authority, under the broad powers of the President, we need not now stop to inquire. Both the Congress and the Executive did act, and their action was valid.

The case arose over a penalty statute of Arkansas. To quote

“A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an em-

ployee, with or without cause, it shall pay him his full wages within seven days thereafter, and that if payment is not duly made, 'then as a penalty for such nonpayment, the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid.' Kirby's Digest, 6649 as amended by Act of 1905, No. 210."

The court reasoned:

"The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General, through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace, for the period provided, the private ownership theretofore existing.' *Northern Pac. R. Co. v. North Dak.*, 250 U. S. 135, 148, 63 L. Ed. 897, 902; P. U. R. 1919 D, 705; 39 Sup. Ct. Rep. 502."

In the course of the opinion, the court said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in Sec. 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws

or at common law,' and the provision in Sec. 15, that the 'lawful police regulations of the several states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws, the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

The government, acting under its sovereign authority, through the Executive himself, limited its liability. The court held:

"The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hines v. Tay-*

lor, — Fla., — 84 So. 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute.”

There we have it plainly stated. The sovereignty, while it consented to be sued, still validly limited its liability by General Order No. 50. What a different story is presented when we come to government owned corporations. These corporations were set up just like other corporations.

From the earliest day of an instance of the exercise of constitutional power through government corporations, the courts have held them not immune from suit. One of the earliest cases bearing upon this subject is

Bank of Kentucky v. Wister, 2 Pet. 318,
7 L. Ed. 437,

handed down in 1829. In

Keifer & Keifer v. Reconstruction
Finance Corporation, 306 U. S. 381,
83 L. Ed. 784,

involving directly a Regional Agricultural Credit Corporation, it was contended, as here, that the Regional was immune to suit. The Ault case was handed down in 1921; the Keifer case in 1939. The Ault case was cited by counsel in their briefs in the Keifer case to the Supreme Court among other cases; but the legal “climate,” so far as the attitude of courts towards such agencies is concerned, had materially changed in the eighteen years. In the course of the opinion, speaking of the general practice

to include legislation providing for such corporations the authority to sue and be sued, the court said:

“Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.”

Again, in the Keifer case, the court said:

“Therefore, the government does not become the conduit of the immunity in suits against its agents or instrumentalities merely because they do its work. United States v. Lee, 106 U. S. 196, 213, 221; 27 L. E. 171, 179, 182; 1 S. Ct. 240; Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U. S. 549, 567; 66 L. Ed. 762, 768; 42 S. Ct. 386, 48 Am Bankr. Rep. 249. For more than a hundred years corporations have been used as agencies for doing the work of the government. Congress may create them ‘as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the states.’ Luxton v. North River Bridge Co., 153 U. S. 525, 529; 38 L. Ed. 808, 810; 14 S. Ct. 891. But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted.” (Emphasis ours.)

One cannot read the decision without appre-

ciating the fact that the Ault case must be narrowly limited.

The learned annotator, who prepared the notes following the Keifer case, sums up the rule of the scores of authority as follows:

“The purpose for which a governmental corporation is created, or the function which it is designed to fulfill, is generally regarded as of importance in determining whether such corporation is subject to suit. For example, where a state or the United States creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily held subject to suit the same as any private corporation organized for the same purpose.”

Among the many cases holding to liability decided by the United States Supreme Court and Federal Courts, are the following:

Bank of United States v. Planters Bank
(1824) 9 Wheat. 904, 6 L. Ed. 244;

Lord & B. Co. v. United States Shipping
Bd., (1920, D. C.); 265 F. 955;

Providence Engineering Corp. v. Downey
Shipbuilding Corp. (1923, C. C. A. 2d),
294 F. 641;

(Writ of certiorari denied in United States
Shipping Bd. Emergency Fleet Corp. v.
Chase Nat. Bank (1924), 264 U. S. 586,
68 L. Ed. 862; 44 S. Ct. 334);

Wallace v. U. S. Shipping Bd. Em. Fleet
Corp. (1925; D. C.) 5 F. 2d 234.

Standard Oil Co. v. United States,
(1928; D. C.) 25 F. 2d 480;

Pennell v. Home Owners Loan Corp.,
(1937; D. C.) 21 F. Supp. 497;

United States ex rel Skinner & E. Corp. v.
McCarl (1927), 275 U. S. 1; 72 L. Ed. 131;
48 S. Ct. 12;

Federal Sugar Ref. Co. v. United States
Sugar Equalization Bd. (1920; D. C.),
268 F. 575;

Gould Coupler Co. v. United States Ship-
ping Bd. Emergency Fleet Corp. (1919;
D. C.), 261 F. 716.

The State Courts, Kentucky, Nebraska, New
Jersey, New York, Ohio, Pennsylvania and
Washington, as is fully shown in the annota-
tions to the Keifer case, have all held accord-
ingly.

The last remaining sector in the battle con-
cerning suability of a corporation created by
government was that of liability for tort, now
effectively settled by the decision in the Keifer
case. The same holding has been made in

Gillen v. Home Owners Loan Corporation,
8 N. Y. S. 945, (2d),
21 N. E. (2d) 521.

In

Sevin v. Inland Waterways Corp.,
88 Fed. (2d) 988,

the court said:

“By Section 5 (b) 49 U. S. C. A. Section 155
(b), the (Inland Waterways) corporation

may sue and be sued in its corporate name. The act does not say how it may be sued. It would be suable as other corporations are sued, notwithstanding its public ownership if there were no law to the contrary."

In

Herman v. Home Owners Loan Corp.,
120 N. J. L. 437,
200 Atl. 742,

the court, after duly considering the matter, said:

"But taken in connection with other features adverted to above, it is persuasive that this corporation was intended by Congress to be accountable for such liability as would attach to a private mortgage loan corporation managing real estate acquired by foreclosure of a mortgage to it."

We come down now to Feb. 1, 1940, when the Supreme Court handed down *Federal Housing Administrator v. Burr*, 309 U. S. 242, 84 L. Ed. 727, where the high court said:

"Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied re-

striction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. **In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue and be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.**"

Still these government owned corporations again advanced what they conceived was the question of their legal status, and again the Supreme Court, in *R. F. C. v. J. G. Menihan Corporation*, 312 U. S. 81, 85 L. Ed. 595, almost impatiently said:

"These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trademark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the *Keifer and Burr* cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. **We**

apply the farther principle that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances."

See also 65 C. J. 1299, Sec. 79.

Again see 65 C. J. 1302, Secs. 82-83.

But compensatory damages are not "penalty," even where the sovereignty of the United States is concerned, under General Order No. 50, which order is not applicable here.

McDaniel v. Hines, Director General,
292 Mo. 401; 239 S. W. 471;

Page v. Payne, 293 Mo. 600,
240 S. W. 156;

Jahns v. Nolting, 29 Cal. 507.

RESUME

In the foregoing brief we feel we have demonstrated beyond doubt the correctness of the judgment of the court below. It seems clear that the quantum and quality of judicial authority discloses that the proper construction of the statute in question applies it to all cases in line with the case at the bar imposing the double damages for interference with or alienation of chattel property between the date of death and the appointment of an administrator; that neither intent nor good faith constitutes a defense; that the statute was adopted from California with its construction, which is binding. That *Muth v. Goddard*, applying to real estate, has no application here.

We respectfully submit that the judgment below should be affirmed.

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Attorneys for Appellee.

REPLY BRIEF OF APPELLANT

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 9956

REGIONAL AGRICULTURAL CREDIT CORPORATION
OF SPOKANE, WASHINGTON, a corporation,
Appellant,
vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon
T. Douglas, deceased,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the United States for the
District of Montana, Great Falls Division.
HONORABLE CHARLES N. PRAY, *Judge.*

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REPLY BRIEF OF APPELLANT

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REPLY REGARDING STATEMENT OF THE CASE

On page 4 plaintiff states "There are many inaccuracies in appellant's statement of facts throughout its brief but we shall only mention a few of them at this juncture." A grave accusation! Nevertheless, plaintiff does not mention any such inaccuracies.

On page 4 plaintiff refers to the inclusion in the record of certain pleadings and trial briefs and makes the statement that no comment thereon is found in appellant's brief. They are referred to on page 5 of appellant's brief where the statement is made in lines 4 and 5, "These questions were fully argued and briefed to the court (R. 36-72). The court sus-

tained the demurrer (R. 35)." They are relied on for the assertion that the District Court originally held that the Montana penalty statute was not applicable to this case. It is submitted that the briefs demonstrate that the only question submitted for the decision of the court was the question of the applicability of the Montana penalty statute, (R. 36-72) and that the sustaining of the demurrer (R. 35) necessarily involved a holding that the Montana penalty statute was inapplicable.

On page 5 in the paragraph numbered (2) it is stated that fraud, bad motive and wrongful intention on the part of the R. A. C. C. were all present in this case. Attention is called to the fact that no reference to the record is made at any place in appellee's brief to sustain this very serious charge.

Appellant's reply brief will discuss the subjects in the same order as in the opening brief and in appellee's brief.

I

REPLY ON INAPPLICABILITY OF SECTION 10140 TO A CHATTEL MORTGAGE WITH A POWER OF SALE.

On page 6 plaintiff asserts "The great weight of authority, and substantially all authority holds that a power of sale, where title has not been vested by an instrument or trust, does not survive death." Plaintiff then cites cases from Montana, United States Supreme Court, California, Georgia, New York, and North Carolina and Corpus Juris Secundum. On page 8 the assertion is made that the chattel mortgage did not pass legal title to the mortgagee and it is asserted that the power of sale in the case at bar was different from the power of sale in the Muth case for that reason. Plaintiff's argument seems to be that if there had been a trust deed, the power of sale would have been coupled with an interest, but it being a mortgage it is not a power coupled with an interest. These authorities merely hold that the term "a power coupled with an interest" means "interest in the subject matter over or concerning which the power is to be exercised;" and that the interest must be in the thing itself. Such is the holding of the leading case of *Hunt v. Rousmanier's Admr.* 8 Wheat.

174, 5 L. Ed. 589. None of the authorities say that the lien of a chattel mortgagee is not such an interest in the thing itself.

The Supreme Court of Montana discussed this very question in the case of *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621. On page 626, in discussing whether a power of sale could be executed after the death of the mortgagor, the court referred to the case of *Hunt v. Rousmanier's Admr.* and then to the case of *First National Bank v. Bell Silver & Copper Mining Co.*, 8 Mont. 32, 19 Pac. 403. The court made the following statement (page 626) :

It was said by our own court, in *First National Bank v. Bell S. & C. M. Co.*, supra: "*But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable.*" (Italics added.)

The *Bell* case dealt with a power of sale in a mortgage. On page 409 of 19 Pac. the court stated the following:

* * While the exact boundary between mortgages with powers of sale and deeds of trust are not very clearly defined, we think the deed in question should be classed with the former.

The Supreme Court of Montana in the *Bell* case in stating that a power of sale in a mortgage would make it irrevocable was therefore discussing a power of sale in a mortgage and not in a deed of trust and the Supreme Court of Montana in the *Muth* case in its discussion of *Hunt v. Rousmanier's Admr.* and the *Bell* case understood that the *Bell* case dealt with a mortgage, not with a deed of trust. The Supreme Court of Montana in the *Bell* case pointed out that mortgages containing powers of sale and deeds of trust are substantially the same thing at law and equity. On page 409 the court said:

* * Mr. Perry, in his work on Trusts, (vol. 2, p. 163, Sec. 602d,) says: "Mortgages containing powers of sale and deeds of trust to secure a debt due to a

creditor are substantially the same thing at law and equity. *At law both kinds of deeds purport to convey the legal title to the grantee or creditor or trustee; but in equity the land, the title, and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.'* If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. (Italics added.)

The Muth and Bell cases repudiate plaintiff's contention that there is a difference between trust deeds and mortgages in this particular. No logical reason is suggested why there should be a difference.

It being the law in Montana, as determined by its Supreme Court, that a power of sale in a mortgage is a power coupled with an interest so that it survives death, this court will follow the law as so announced under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

In this connection it is also to be noted that the District Court concluded that there was a power of sale but that it was suspended by the provisions of Section 10140 (R. 306). In its opinion the court expressly stated that it was of the opinion that the power of sale survived the death of the mortgagor. (R. 298.) Plaintiff has not assailed this conclusion of law, either by a cross appeal or by a specification of error.

II

REPLY ON INAPPLICABILITY OF SECTION 10140 IN ABSENCE OF EVIDENCE THAT THE SALE OF MORTGAGED ASSETS WAS FRAUDULENT OR PURSUANT TO WRONGFUL MOTIVE OR FOR THE PURPOSE OF WRONGFULLY DEPRIVING DECEDENT'S ESTATE OF ITS ASSETS.

Section 10140 is a penal statute.

On page 11 plaintiff makes the assertion that Section 10140 Revised Codes Montana 1935 is not a penal statute, citing the case of *Jahns v. Nolting*, 29 Cal. 507. Plaintiff further asserts that the construction of the California statute made in *Jahns v. Nolting* was adopted by Montana when it adopted the statute in question from California.

It is remarkable but true that *Jahns v. Nolting* does say that the California statute then in effect, substantially similar to Section 10140, was not a penal statute. In discussing the matter the court in *Jahns v. Nolting* went further and stated on page 513:

* * Such is the case in respect to sections two hundred and fifty and two hundred and fifty-one of the Practice Act, which provide respectively, that in certain actions for waste, and actions for cutting down and injuring timber, etc., the plaintiffs shall be entitled to treble damages; but those statutes, like the one under consideration, are not penal, but are remedial.

The foregoing is directly contrary to the holding of the Supreme Court of Montana in the case of *McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668 (1894). This case is discussed on page 24 of defendant's opening brief. It is 28 years later than the case of *Jahns v. Nolting* regarding the same statute granting treble damages for damage to timber. The Supreme Court of Montana on page 670 said:

* * * *It is needless to observe that the law is highly penal in its character.* By way of punishment it subjects the wrongdoer in certain cases to an extraordinary liability for the property of another appropriated to his use. (Italics added.)

The McDonald case establishes the law in Montana and in this case.

No case other than *Jahns v. Nolting* has stated that a double liability statute like Section 10140 is not a penal statute. On the contrary, all other courts discussing the matter state

that it is a penal statute. Even the Supreme Court of Oklahoma, cases from which are so heavily relied upon by plaintiff, has so stated. *Nichols & Shepard Co. v. Dunnington*, 121 Okl. 213, 247 Pac. 353 (1926) on page 355, the court said:

* * * *In order to recover the penalty prescribed by this statute, the plaintiff must fasten one of the enumerated acts upon the defendant. (Italics added)*

It is so stated in *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479 (1906). On page 481 the court said:

* * * *The statute is highly penal in its consequences and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages; and its language should, we think, be so construed. (Italics added.)*

It is so stated in *Roys v. Roys*, 13 Vt. 543 (1841). On page 545 the court said:

* * * *The statute, subjecting the party to pay double the value of the property, is highly penal in its consequences, and should not be applied to a case where he acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise. (Italics added.)*

Accord:

Batchelder v. Tenney, 27 Vt. 578 (1855)

Delfelder v. Poston, 42 Wyo. 176, 293 Pac. 354 (1930)

It is so stated in the text book relied upon by plaintiff. *Bancrofts Probate Practice*, Vol. 2, on page 893 the author stated:

* * * *It is well said that the statute is highly penal in its consequences, and intended only to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property*

of a deceased person. To subject a defendant to the penalty given by the statute, it should therefore appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. (*Italics added.*)

Montana has not adopted from California any construction of Section 10140 contrary to defendant's position. Plaintiff asserts the contrary on pages 11, 12 and 19.

In the first place, *Jahns v. Nolting* does not hold that the penalty statute will be applied to an innocent alienation of assets. The allegations of the complaint in *Jahns v. Nolting* were within the California penalty statute. The plaintiff, however, failed to prove a case within the penalty statute, probably because he failed to show that the alienation occurred intermediate the death of the decedent and the appointment of a personal representative. See the last sentence in the second paragraph commencing on page 513. The trial court merely found against the plaintiff under the allegations pursuant to the penalty statute and failed to find whether there had been an ordinary common law conversion outside the statute. To this failure the plaintiff excepted. The Supreme Court held that entirely aside from the penal statute an administrator had an ordinary common law action for conversion and that the court should have found with respect to it. That is the only holding in the case. The language relied on by plaintiff is dictum enunciated in 1866. There is no California case applying the double penalty California statute in a case where there has been merely an innocent alienation.

On page 19 of his brief plaintiff makes the statement that the district court took judicial notice of the fact that the Montana Code containing the statute in question was adopted in 1895. This is not correct. It first appeared as Section 129 of the Probate Practice Act in Laws of Montana 1877 at page 270. It read as follows:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of

a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Section 10140, Revised Codes of Montana 1935, is precisely the same except that it eliminates the comma after the word "therewith."

Also on page 21 plaintiff states that Section 10140 was taken from California. No authority for the statement is cited. What is the evidence? The similar California statute is first to be found as Section 116 of Estates of Deceased Persons, page 392 of Laws of California 1850-53. The section as it there appeared reads:

"If any person prior to the granting of letters testamentary or of administration shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable and be liable to the action of the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Although the substance of the two sections is the same, there are ten differences in wording and punctuation. Why, if the Montana statute was copied from the California statute, should there be ten differences in punctuation and wording?

It is pointed out in the case of *Delfelder v. Poston*, *supra* that the statute in question in various forms existed in a great many States. What evidence is there that the Montana statute was copied from the California statute rather than the statute, let us say, of Vermont, where it was applied in an entirely different way? The Vermont statute was much older than the California statute, having been the Sixty-eighth Section of the Probate Act of 1821, to be found in Compiled Statutes, page 347.

Assuming, however, that it was adopted from the California statute, it is not within the rule relied upon.

An exception to the rule relied upon is that the construction placed upon the foreign statute by the foreign court will not be followed if such construction is regarded as unsound in principle and against the weight of authority. This has been decided frequently by the Supreme Court of Montana. See:

State v. Callow, 78 Mont. 308, 254 Pac. 187

The court on page 193 said:

“* * However, the rule that the adoption of a statute from another state carries with it the construction placed upon it by the courts of such state prior to adoption will be followed in this state only when that construction appeals to us as based upon sound reasoning and consonant with the intention of the Legislature in enacting the statute.”

State v. Stewart, 57 Mont. 144, 187 Pac. 641,

Deer Lodge County v. United States Fidelity & Guaranty Co., 42 Mont. 315, 112 Pac. 1060,

Anaconda Div. No. 1 v. Sparrow, 29 Mont. 132, 74 Pac. 197.

The holding by the Supreme Court of Oregon in *Springer v. Jenkins*, *supra*, that the penal statute will not be applied in the absence of wrong motives or bad faith, has not been overruled or impaired by subsequent Oregon cases. On page 23 plaintiff seems to leave the impression that the authority of *Springer v. Jenkins* with regard to the construction of the penalty statute had been overruled or impaired by subsequent Oregon cases. This is not correct. The case of *Swank v. Elwert*, 55 Ore. 487, 105 Pac. 901, on page 907, did criticize *Springer v. Jenkins* for holding that the defendant must affirmatively plead the amount of the debt in order to avail himself of the indebtedness in mitigation of damages. A reading of *Gabel v. Armstrong*, 88 Ore. 84, 171 Pac. 190, will also disclose that this was the only criticism made of the case of *Springer v. Jenkins*. The holding by *Springer v. Jenkins* that the penalty statute will not be applied in the absence of bad faith or wrongful motive stands unimpaired in

Oregon. *Springer v. Jenkins* is cited as authority for that principle in *Bancrofts Probate Practice*, page 893, where the author states:

* * To subject a defendant to the penalty given by the statute, it should therefore appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law.

On pages 24 to 27 plaintiff asserts that *Merrill v. Comstock*, *Batchelder v. Tenney*, *Roys v. Roys*, *Jackson v. Lamar*, and *McDonald v. Montana Wood Co.*, disappear as authorities or do not have the remotest bearing upon the case at bar. Space does not permit repetition of the description of these cases. It is submitted that a reading of the cases will disclose that they are potent authorities in the case at bar.

Oklahoma is the only jurisdiction where a statute substantially similar to the Montana penalty statute has been applied to alienation in the absence of fraudulent conduct on the part of the alienor. The doctrine in Oklahoma has, however, been seriously impaired.

The first case so holding is *Litz v. Exchange Bank of Alva*, 15 Okl. 564, 83 Pac. 790 (1905). This was a hard case and although no direct evidence of fraudulent conduct is recited by the appellate court, there is at least the suggestion of surreptitious conduct or collusion. Cattle mortgaged for \$9.00 a head and stipulated to be worth \$12.00 a head were sold at foreclosure sale at \$4.30 per head.

The *Litz* case has been followed twice. *Aultman and Taylor Machinery Company v. Fuss*, 86 Okl. 168, 207 Pac. 308 (1922). *Sauls v. Whitman*, 171 Okl. 113, 42 Pac. (2d) 275 (1935). The authority of the *Litz* case has, however, been seriously impaired by a series of three cases. The first is *Shawnee National Bank v. Van Zant*, 84 Okl. 107, 202 Pac. 285 (1921). Van Zant died in 1913. Prior to the appointment of an administrator the bank sold alfalfa seed and used the proceeds to pay debts of the decedent. Thereafter the widow was

appointed administrator and sued the bank for double the value of the seed sold. There was no evidence that the bank had been depriving the estate of its assets or that it had acted otherwise than in good faith. It had, however, brought itself within the principle contended for by plaintiff in the case at bar, in that it had alienated personal property of a decedent intermediate the death and the appointment of a personal representative. The court refused to apply the statute. On page 289 the court said:

* * Of course if there was fraud connected with the transaction, or the party obtained an advantage over the estate, he might not be permitted to rely upon the wrongful acts of the executor de son tort, to obtain such an advantage over the estate or other creditors.

The second case is *Nichols & Shepard Co. v. Dunnington, supra*. Here the decedent had mortgaged certain machinery to Nichols & Shepard Co. After death it took possession of the machinery, advertised it for sale under the mortgage, held the sale and bid the property in. Thereafter, acting as the owner, it again advertised the property for sale and again bid it in. The Lower Court following the *Litz* case directed judgment for double the value of the machinery and deducted the amount of the indebtedness. There was no evidence that defendant was attempting to deprive the estate of its assets. The Supreme Court refused to apply the Oklahoma statute and distinguished the *Litz* case upon the ground that there the sale was to a third person instead of the mortgagee. That this was a distinction, without substantial difference, is pointed out by the Supreme Court of Wyoming in the case of *Delfelder v. Poston, supra*. If the Oklahoma court had desired to apply the doctrine of the *Litz* case it could have reasoned that, prior to the foreclosure sale the property had been owned by the decedent and the heirs of the decedent and the result of the foreclosure sale was to pass title to a new owner and that it was immaterial whether such new owner was the mortgagee itself or a third person.

The third case is *In re Wagner's Estate*, 178 Okl. 384, 62 Pac. (2d) 1186 (Okl. 1936). A husband took money belong-

ing to the estate prior to the appointment of an administrator and paid the same out. On page 1191 the court said:

Where, before the appointment of an administrator, money belonging to the estate of a decedent is used by her husband to pay just and reasonable expenses of the funeral of the decedent, such action does not constitute either embezzlement or alienation within the terms of section 1219, O. S. 1931. *Nichols & Shepard Co. v. Dunnington*, 118 Okl. 231, 247 Pac. 353.

It is submitted that the authority of the *Litz* case is seriously impaired by these three cases.

The principle of construction *noscitur a sociis* is applicable.

Plaintiff attempts to dispose of the doctrine of *noscitur a sociis* by a quotation from 59 Corpus Juris 979 to the effect that the use of the disjunctive militates against the application of the maxim. The only cases cited in footnote 46 to support the text are from Porto Rico and are not available for reading. It is to be noted that the text merely states that the disjunctive "militates" against the application of the maxim. In other words, in some cases the conjunctive would tend to make a stronger case for the application of the doctrine than the disjunctive. No authority is cited to the effect that the doctrine is inapplicable in the presence of a disjunctive. It would, of course all depend on the context.

Max Worthington acted only as agent of his wife. On page 34 the statement is made that the wire to R. A. C. C. dated January 23, 1935, reading "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations," was sent by Max Worthington and not Dorothy Worthington. This is unfair comment. Max Worthington testified that he conferred with the R. A. C. C. respecting the assumption of the indebtedness with the knowledge and authority of his wife (R. 185). He further testified that he dispatched the telegram in question, Exhibit 5, with the knowledge and authority of his wife (R. 185). Counsel for plaintiff stated that he did not question the authority of Max Worthington to act for Dorothy Worthington (R. 187). The telegram from R. A. C. C. Exhibit 4, (R. 178) was addressed to Dorothy

Worthington. The evidence and stipulation of counsel for plaintiff (R. 184 to 187) demonstrate that the wire dispatched by Max Worthington was for and on behalf of his wife, Dorothy Worthington.

III

REPLY AS TO THE LACK OF EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE VALUE OF THE PROPERTY SOLD WAS \$17,000.00.

Plaintiff, in order to sustain the finding, is reduced to the extremity of attempting to base an argument upon Exhibit 9 (R. 243). Exhibit 9 is an application for a renewal loan executed by the decedent, Simon Douglas, on November 27, 1934, more than two months prior to the material date as to value of the property sold. The application represented the value of the mortgaged property to aggregate \$21,235.00. (See second page of Exhibit 9, R. 244.) Plaintiff contends that this is evidence of market value of the property sold. They were, in fact, representations respecting loan value made in an application for a loan on a going concern. They had nothing to do with market value. (See the uncontradicted evidence of plaintiff's witness Hal Clement, (R. 122, 123). Market value results only from the action and reaction of both a buyer and a seller.

Even if the application had to do with market value, it was executed on November 27, 1934. (Ex. 9, R. 243.) Circumstances at the time of the sale had changed as to several of these items so that the values set forth in the application were greatly reduced. 88 bucks were included in the application and are set up at a value of \$20.00 per head. (R. 244.) The bucks sold were 36 four year olds, 30 five year olds and 8 aged. (R. 208, 209.) These bucks were old, the breeding season was over, they had served their purpose until the next breeding season. Most of them would never be used again. 36 of them were sold with the 1080 band of sheep at \$2.25 per head (R. 208) and 38 of them in the other band at \$3.40 per head. (R. 209.) There was received for the bucks a total of \$210.00. (R. 86.) They were set up in the application for \$1760.00, a difference of \$1550.00 and over 800 per cent. (R. 243.) The application

sets up 30 horses aggregating \$1125.00. (R. 244.) Only 21 were sold for a total of \$860.00. (R. 86, 159.) The machinery and equipment is set up in the application at \$2500.00. It was old (R. 215) and when sold had to be transported. It sold for only \$435.00. (R. 159.) Merely in bucks, horses, machinery and equipment there is a demonstrable difference between the values set up in the application and the market price on February 5, 1935 aggregating \$3,880.00. It is to be observed that Mr. Douglas put in 1186 old ewes at \$3.00 a head for an aggregate of \$3,558.00. This was in the fall of 1934, when according to the evidence the Government was buying old ewes at \$2.00 a head and it was the opinion of everybody who testified on the subject that that was in excess of the market value. (R. 213, 255, 268, 277, 280, 284.) This is a further difference of at least \$1,186.00 in the valuation set up by Simon Douglas. The items above discussed aggregate \$5,066.00. If deducted from the total of \$21,235.00 set up in the application the balance is \$16,169.00. The property sold for \$15,002.10. There is a further difference in that the application set up 168 head of sheep more than were sold. This was no doubt due to normal winter losses. Of course, when a borrower in the position of Simon Douglas, whose loan was in bad condition, makes an application for a renewal of his loan he does not give himself any the worst of it in setting up the valuations.

Plaintiff is not content to limit his argument, based on Exhibit 9, to chattels which were mortgaged to and sold by defendant at the foreclosure sale. On page 37 he bases an argument upon representations made by decedent in his financial statement shown at R. 243. Thus, plaintiff argues that decedent's sheep alone were worth \$20,110.00. The financial statement to this effect showed 4251 sheep. The sheep sold by defendant, according to the uncontradicted evidence, aggregated only 3427. (R. 155.) The value of the 4251 sheep was represented by the decedent to be \$20,110.00, upwards of \$4.70 per head, a figure palpably absurd so far as market value is concerned. Plaintiff also bases his argument upon \$2650.00 worth of hay represented to be 265 tons, although defendant sold only an aggregate of 136 tons. Not content with basing his argument upon items which were in existence, plaintiff goes further and bases it upon the estimated 1935

wool clip and lamb crop, although neither was in existence at the time of the sale.

It is submitted that plaintiff's argument in this regard comes to nothing.

IV

REPLY AS TO THE DEDUCTION OF THE INDEBTEDNESS SECURED BY THE MORTGAGE PRIOR TO APPLYING THE DOUBLE PENALTY OF THE STATUTE.

To support its position in this regard defendant cited cases from Wisconsin, Wyoming and Oregon. Against the contention plaintiff cites only one case arising under this double penalty statute, to wit: *Aultman and Taylor Machinery Co. v. Fuss* on page 43. It is submitted that not only the weight of authority but also better reason and logic supports the rule contended for by defendant.

V

REPLY AS TO A WHOLLY OWNED GOVERNMENTAL INSTRUMENTALITY OF THE UNITED STATES NOT BEING SUBJECT TO THE MONTANA PENALTY STATUTE.

On page 44 plaintiff asserts that R. A. C. C., although a wholly owned instrumentality of the United States Government, is liable "exactly like any other private corporation." The assertion is completely repudiated by the reasoning of the Supreme Court of the United States in *Federal Land Bank v. Bismarck Lumber Co.*, et al., No. 76 in the October term, 1941, decided November 10, 1941, 62 S. Ct. 1. There the losing party argued that the Federal Land Bank was functioning as a private corporation. On page 5 the court said:

The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional

exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477, 59 S. Ct. 595, 596, 83 L. Ed. 927, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental.

Defendant's argument in regard to the applicability of the *Bismarck Lumber* case to the case at bar appears on pages 43 and 44 of the opening brief.

On page 47 plaintiff attempts to avoid the doctrine of *Missouri Pacific Railway Co. v. Ault*, 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593, because General Order No. 50 of the Director General provided that the order should not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

General Order No. 50, was promulgated by the Director General of Railroads on October 28, 1918, and is set forth in Exhibit E. The Supreme Court of the United States in the *Ault* case, did not, at all, base its decision upon General Order No. 50 but based it solely upon the Federal control statute and merely commended the Director General because in the general order, by eliminating actions for fines, penalties and forfeitures, he followed the statute as construed by the Supreme Court of the United States. On page 564 the court said:

* * In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, "provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

General Order No. 50 was not relied upon by the court as authority for the construction of the statute but was merely made the object of commendation by the court because the Director General had construed the statute the same as did the Supreme Court in the *Ault* case.

Neither of the parties in the Ault case relied upon General Order No. 50 as controlling the rights of the parties. On page 556 the court described the contention of the Director General as follows:

* * * *The Director General did not contest liability for wages actually due, but claimed that under the legislation of Congress he was not liable for the penalty and that the state statute as applied to him was void under the Federal Constitution. The claims of both defendants having been denied by the highest court of the State, they brought the case here by writ of error. (Italics added.)*

On page 563 the court made the following statement respecting the contention of Ault:

The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is *rested specifically upon the clause in Section 10 to the effect that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," and the provision in Section 15 that the "lawful police regulations of the several States" shall continue unimpaired. (Italics added.)*

The Ault case was relied upon by the District Court for the Southern District of New York in the *Corrigan* case and in the *McCrea* case and by the Circuit Court of Appeals for the Second Circuit in the *McCrea* case as constituting authority that consent by Congress to suit does not constitute consent by Congress to the imposition of penalties. Neither the District Court nor the Circuit Court of Appeals considered the case as resting upon the General Order of the Director General of Railroads. Reflection would probably lead to the conclusion that Congress could not, if it desired, leave to the discretion of the Director General a determination of whether the Director General could be suable either for compensatory or penal actions. Such a delegation would probably be unconstitutional.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

On page 45 and thereafter plaintiff attempts to distinguish the doctrine of *Missouri Pacific Ry. Co. v. Ault* upon the ground that the Director General of Railroads was more intimately a part of the United States Government than is a corporate instrumentality such as R. A. C. C. Defendant's argument in this regard is to be found on pages 45 to 48 of the opening brief. It is submitted that the authorities there referred to demonstrate that R. A. C. C. is no less a part of the sovereign government of the United States than the Director General. Any judgment against this defendant based on the Montana Penalty Statute would have to be paid from the Treasury of the United States.

On pages 44 and 50 to 54 a great number of cases are cited by plaintiff on this question. Space is insufficient to discuss each of these cases. Suffice it to say that no one of them holds that a corporate instrumentality of the United States is subject to a State penalty statute. Moreover, there is no contention by plaintiff that any of those cases so hold.

It is respectfully submitted that the judgment of the District Court should be set aside and that judgment should be entered in favor of the appellant.

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APPENDIX E

GENERAL ORDER NO. 50

Washington, October 28, 1918.

WHEREAS by the Proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said Proclamations that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes * * * but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such"; and

WHEREAS the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President"; and

WHEREAS since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and

damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

W. G. McADOO,
Director General of Railroads

